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WHEN OLD PRINCIPLES FACE NEW CHALLENGES:
A CRITICAL ANALYSIS OF THE PRINCIPLE OF
DIPLOMATIC INVIOABILITY

THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF
PHILOSOPHY

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July 2014

DECLARATION

I hereby declare that this thesis has not been submitted, either in the same or different form, to this or any other University for a degree and the work produced here is my own except stated otherwise.

Sign:

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Abstract

This thesis aims to provide a comprehensive analysis of the principle of diplomatic inviolability. The principle of diplomatic inviolability is generally regarded by international law scholars as one of the oldest established principles of international law. The concept of inviolability in contemporary international law contains two distinct aspects: in terms of the duty of the receiving State, the first aspect involves the negative duty of not taking any enforcement action against the inviolable diplomatic premises, diplomatic agents or the diplomatic property, while the second aspect requires the positive duty to protect these premises, personnel and property. The contemporary legal regime governing the principle of diplomatic inviolability can be seen through the core provisions stipulated in the Vienna Convention on Diplomatic Relations 1961.

Several controversies can be identified when the authorities of the receiving State face dilemmas of deciding whether the principle of diplomatic inviolability or other norms of international law shall prevail. The dilemmas reveal the conflicts between the principle of diplomatic inviolability and other norms of international law, such as the protection of national security, public safety and human life. In the era of fragmentation of international law, it is not easy for either the authorities of the receiving State or international law scholars to settle the controversies with any straightforward solutions, for the reason that the precedence of diplomatic inviolability would inevitably compromise other norms and vice versa.

The thesis examines the concept and theoretical basis of the principle of diplomatic inviolability, explores the historical evolution of the principle, analyses the contemporary legal regime of the principle and the controversies involving the conflicts between the principle and other norms of international law. Finally, the thesis critically reviews the various traditional solutions and proposes several alternative solutions to settle the controversies.

Abbreviations

AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
CUP	Cambridge University Press
Cmnd	Command Papers 1956-1986
ECHR	European Convention on Human Rights
GAOR	United Nations General Assembly Official Records
HC	House of Commons
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
ILR	International Law Reports
MFA	Ministry of Foreign Affairs
OUP	Oxford University Press

PCIJ	Permanent Court of International Justice
UN	United Nations
UN Doc	United Nations Document
UNGA	United Nations General Assembly
UN HRC	United Nations Human Rights Committee
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
VCCR	Vienna Convention on Consular Relations 1963
VCDR	Vienna Convention on Diplomatic Relations 1961
YILC	Yearbook of International Law Commission

List of Cases

Asylum Case (Columbia v Peru) [1950] ICJ Rep 266

Bancoult v Secretary of State for Foreign and Commonwealth Affairs, [2014] EWCA Civ 708; [2014] 1 WLR 2921

Boos et al v Barry, United States Supreme Court (22 March 1988) 485 US 312

Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep 168

Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14

Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Order) (Request for the Indication of Provisional Measures) [1979] ICJ Rep 7

Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) [1980] ICJ Rep 3

Case concerning the Factory At Chorzów (Germany v Poland) [1928] PCIJ Series A, No. 17

Finzer v Barry, 121 ILR 499

Kivenmaa v Finland, UN HRC ‘Communication No 412/1990’, (31 March 1994) GAOR 49th Session Supp 40 vol 2, 85

Ministry for Foreign Affairs and Trade and others v Magno and another, 101 ILR 202

Public Prosecutor v LC (2002-2003) 8 Rechtskundig Weekblad 301

Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Order), (3 March 2014) General List No. 156

Respublica v De Longchamps (1784) 1 US 111

R v Commissioner of Police for the Metropolis, CO/129/2000, unreported (*The Times*,
20 October 1999)

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Introduction

It is widely recognised by international law scholars that diplomatic law, like the law of treaties and the law of war, is certainly one of the oldest branches of public international law, the origins and practices of which can be traced back to antiquity. For example, Barker points out that '[t]he roots of diplomatic law lie buried in ancient history, making it one of the oldest branches of international law',¹ while the latest edition of *Oppenheim's International Law* also makes a similar statement, which suggests that the law of diplomacy itself is 'as old as history'.² Among all the rules and principles in diplomatic law, it is generally agreed that the principle of diplomatic inviolability is the most important one, which can be justly titled as one of the underlying principles of diplomatic law and international law.³ In fact, the personal inviolability of diplomatic agents — one of the most important categories of the principle of diplomatic inviolability — is generally recognised by international law scholars as 'the oldest established and the most universally recognised' principle.⁴ That being said, the question may be asked as to why the principle of diplomatic inviolability is still important in today's international law and, indeed, whether it is worth a research project at all? The author of this thesis believes that the value of undertaking a research project on the principle of diplomatic inviolability can be reflected in the following three points.

¹ JC Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Dartmouth 1996) 14.

² R Jennings and A Watts (eds), *Oppenheim's International Law* (9th edn Longman 1996) vol 1, 1053.

³ 'Codification of the International Law Relating to Diplomatic Intercourse and Immunities, Memorandum prepared by the secretariat' in YILC [1956] vol II, 161, para 233-234.

⁴ I Roberts (ed), *Satow's Diplomatic Practice* (6th edn, OUP 2009) para 9.2. See also E Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (3rd edn, OUP 2008) 256.

First and foremost, the principle of diplomat inviolability is faced with great challenges nowadays. The disappointing reality is that even though the inviolability of diplomatic missions and the inviolability of diplomatic personnel are well recognised and generally observed by all States, attacks on inviolable diplomatic premises and diplomatic personnel are not unusual in contemporary international affairs. For instance, in September 2012, a series of anti-US demonstrations broke out almost simultaneously outside United States embassies and consulates in numerous North African and Middle Eastern countries as a retaliatory protest against the release and circulation of an anti-Islamic film via the internet a few months previously.⁵ These demonstrations reached their peak when the US consulate in Benghazi, Libya was fiercely assaulted by local demonstrators, resulting in the unfortunate death of the US ambassador to Libya, John Christopher Stevens.⁶ Probably, this wave of barbarism reminds international law scholars of the *Tehran Hostages Crisis*⁷ and evidences the fact that the position of diplomats has not improved over the last three decades even after this important decision of the International Court of Justice. As these incidents revealed, it can be acknowledged that the principle of diplomatic inviolability is still of vital importance and relevant in contemporary international law.

⁵ 'Protesters attack U.S. diplomatic compounds in Egypt, Libya' (*CNN News*, 12 September 2012) <<http://edition.cnn.com/2012/09/11/world/meast/egypt-us-embassy-protests/index.html>>; 'Yemen protesters storm US embassy - as it happened' (*The Guardian*, 13 September 2012) <<http://www.guardian.co.uk/world/middle-east-live/2012/sep/13/libya-attack-us-ambassador-aftermath-live>>; 'Two dead as protesters attack U.S. embassy in Tunisia' (*Reuters*, 14 September 2012) <<http://www.reuters.com/article/2012/09/14/us-protests-tunisia-school-idUSBRE88D18020120914>> all accessed 29 June 2014. See also 'Q&A: Anti-Islam film' *BBC News* (20 September 2012) <<http://www.bbc.co.uk/news/world-middle-east-19606155>> accessed 29 June 2014.

⁶ 'US confirms its Libya ambassador killed in Benghazi' (*BBC News*, 12 September 2012) <<http://www.bbc.co.uk/news/world-africa-19570254>> accessed 29 June 2014.

⁷ I Buffard and S Wittich, 'United States Diplomatic and Consular Staff in Tehran Case (United States of America v Iran)' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol X, 543. See also LS Frey and ML Frey, *The History of Diplomatic Immunity* (Ohio State University Press 1998) 515-525.

Secondly, it has been recognised that contemporary international law also faces new challenges, especially with regard to the phenomenon of fragmentation of international law.⁸ As Pauwelyn points out,

Fragmentation of international law, and the questions of co-ordination and conflict that it raises as between norms and between institutions, is a reality.⁹

The impact of the fragmentation of international law on the principle of diplomatic inviolability lies in the emergence of certain conflicts between this principle and other norms of international law. Although some of the conflicts can be traced back to the ‘Classical Periods’ of international law in the seventeenth and eighteenth century, it was not until the establishment of the United Nations, and probably with the rise of international human rights law, that the conflicts became debated issues among academics. Even though the core rules of the principle of diplomatic inviolability have been systematically codified in the Vienna Convention on Diplomatic Relations 1961,¹⁰ the principle of diplomatic inviolability is not itself immune from the impact of the fragmentation of international law. For example, during the 1980s, several international law scholars challenged the principle of diplomatic inviolability by claiming that the inviolability of diplomatic premises should be overwhelmed by other norms of international law such as the necessity to protect human life.¹¹ Thus, it is sensible to argue that the rules attached to the principle of diplomatic inviolability need to be reassessed and systematically researched so as to keep pace with developments in other

⁸ ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law’ in A Pronto and M Wood (eds), *The International Law Commission 1999-2009* (OUP 2010) vol IV, 614.

⁹ J Pauwelyn, ‘Fragmentation of International Law’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol IV, 219, para 41.

¹⁰ 500 UNTS 95 (adopted 18 April 1961, entered into force 24 April 1964). Hereafter referred to as ‘the VCDR’. As of June 2014, there are 190 State parties to this convention.

¹¹ For detailed discussion and arguments by various scholars, see Chapter 5.

areas of international law so as to confront the new challenges brought by the impact of the fragmentation of international law.¹²

Third, it is frustrating to admit that as of today, there is no single academic work of diplomatic law (or international law) that specifically focuses on the principle of diplomatic inviolability. As a matter of fact, during the first two decades after the adoption and entry into force of the VCDR, there was a peak of discussion on the issue of diplomatic privileges and immunities and a batch of monographs were published on the theme of diplomatic law.¹³ However, most of these publications only provide introductory analysis of the provision of VCDR, and do not pay enough attention to the theoretical and practical issues of diplomatic privileges and immunities. It was not until the publication of Barker's *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?*¹⁴ in 1996 that a systematic review of one specific issues of diplomatic law was provided. The only two monographs on diplomatic law published in recent years are Barker's *The Protection of Diplomatic Personnel*¹⁵ in 2006 and Denza's third edition of *Diplomatic Law*¹⁶ in 2008. In 2009, a new edition of the classic work of Satow's *Diplomatic Practice*, edited by Sir Ivor Roberts was published, though this

¹² It is worth noting that the notion of 'fragmentation of international law' is highly contested among international law scholars. Leading scholars such as Koskeniemi and Pauwelyn are proponents of the notion while Simma is suspicious of the notion. See B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265, 270.

¹³ These monographs include: CE Wilson, *Diplomatic Privileges and Immunities* (The University of Arizona Press 1967); M Hardy, *Modern Diplomatic Law* (Manchester University Press 1968); GEDNE Silva, *Diplomacy in International Law* (Sijthoff 1972); E Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (1st edn, Oceana 1976), B Sen, *A Diplomat's Handbook of International Law and Practice* (3rd edn, Martinus Nijhoff 1988) ; L Dembinski, *The Modern Law of Diplomacy* (Martinus Nijhoff 1988); GV McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (Hurst & Company 1989), to list but a few.

¹⁴ Barker (n 1).

¹⁵ JC Barker, *The Protection of Diplomatic Personnel* (Ashgate 2006).

¹⁶ Denza (n 4).

work is not limited to the theme of diplomatic law. It can be seen that none of these works focuses on the principle of diplomatic inviolability,¹⁷ or on the new challenges faced by the principle. Considering the significance of the principle of diplomatic inviolability and its relevance in contemporary international law, the author of this thesis believes that a dedicated research of the principle of diplomatic inviolability may fill in the gap in the research on diplomatic law and contribute to the literature of diplomatic, and, indeed, international law.

The aim and tasks of the thesis

The two major tasks of this thesis are: to carry out a comprehensive examination of the theory and practice of the principle of diplomatic inviolability, and to critically analyse the legal issues (mainly the controversies) arising from the conflicts between the principle of diplomatic inviolability and other norms of international law. The aim of the thesis is to find out whether there is any feasible and satisfactory solution that can settle the controversies, and to analyse whether the proposed solutions can provide the authorities of the receiving State with some practical measures to tackle the dilemmas they faced in certain scenarios.

The scope of the thesis

As will be discussed in chapter 1 of the thesis, the principle of diplomatic inviolability actually contains three categories: the inviolability of diplomatic premises, the inviolability of diplomatic personnel and the inviolability of diplomatic property. Accordingly, the thesis will discuss all three categories, although the emphasis will be placed on the inviolability of diplomatic premises as this category is generally

¹⁷ The only notable research that related to the principle of diplomatic inviolability is Barker's *Protection of Diplomatic Personnel*. However, as the title suggests, the theme of that book is confined to the protection aspect of the principle, and the scope is limited to the inviolability of diplomatic personnel.

recognised as ‘one of the most fundamental rules of diplomatic law’.¹⁸ The author of this thesis considers the justification to discuss all three categories instead of merely dealing with one category, because of the following three reasons. First, the three categories share the most significant feature of the principle of diplomatic inviolability: they all reflect the two distinct aspects of inviolability: the immunity from any interference and enforcement from the authorities of the receiving State, and the special protection by the receiving State.¹⁹ Secondly, the examination of all three categories provides a more comprehensive understanding of the principle of diplomatic inviolability. As has been pointed out above, there are few academic works of diplomatic law providing a comprehensive analysis of all three categories of the principle of diplomatic inviolability. This thesis will attempt to fill this gap in the literature. Thirdly, as will be discussed in Chapter 2, the historical evolution of the principle of diplomatic inviolability illustrates how, and in which order, these three categories gradually come into existence. Indeed, the three categories are not isolated from each other and so, by exploring all three categories, it will be possible to understand their interrelationship.

It is worth noting that this thesis will limit the scope of discussion to diplomatic inviolability in a narrow sense. Neither consular inviolability nor the inviolability related to *ad hoc* diplomats nor the inviolability related to representatives to international organisations will be covered. After all, contemporary diplomacy varies in forms and each form has its distinctive features.²⁰ Thus, the author considers that it will be impractical for this research project to analyse all forms of inviolability (diplomatic, consular, *ad hoc*, international organisations) in a single piece of work.

¹⁸ J d'Aspremont, ‘Premises of Diplomatic Missions’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol VIII, 413, para 1.

¹⁹ See Chapter 1, section 1.1.1 where the two aspects will be discussed in detail.

²⁰ See M Hardy, *Modern Diplomatic Law* (Manchester University Press 1968) 2-4.

Methodology

The author of this thesis considers that legal positivism is the best available legal methodology for carrying out this research project. Legal positivism, as is pointed out by Ratner and Slaughter,

[S]ummarizes a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical consideration.²¹

Indeed, the classic perspective of legal positivism asserts that a system of legal rules is regarded as ‘an “objective” reality and needs to be distinguished from law “as it should be.”’²² As Hart pointed out, proponents of legal positivism ‘constantly insisted on the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be.’²³ Accordingly, legal positivism requires that subjective factors such as social context and morality are deemed as extra-legal and therefore must not affect the examination of legal rules. That being said, it is worth noting that ‘[r]elying on a positivist conception of law does not necessarily imply subscribing to the view that there is only one correct answer to any legal problem’.²⁴ Remarkably, in the *Tunisia/Libya Continental Shelf Case*, the ICJ pointed out that:

²¹ SA Ratner and AM Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers’ (1999) 93 AJIL 291, 293.

²² AJ Paulus and B Simma, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts – A Positivist View’ (1999) 93 AJIL 302, 304.

²³ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 Harvard Law Review 593, 594.

²⁴ Paulus and Simma (n 22) 307.

[W]hen applying positive international law, the court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be the closest to the requirements of justice.²⁵

As will be revealed in Chapter 5 of this thesis, the above statement can well illustrate the ICJ's interpretation of one specific aspect of the principle of diplomatic inviolability — the inviolability of diplomatic agents. In the profound judgement of the *Tehran Hostages Case*, the Court commented that:

The observance of [the principle of diplomatic inviolability] does not mean ... that a diplomatic agent ... may not, on occasion, be briefly arrested ... in order to prevent the commission of the particular crime.²⁶

Indeed, this is a form of what Paulus and Simma described as 'modern positivism'. According to Paulus and Simma, '[M]odern positivism is able to adapt to new developments in international affairs, even if sometimes at the cost of the beauty of traditional theory — namely, its clarity and rigidity.'²⁷ Nevertheless, such understanding does not mean that modern legal positivism succumbs to the influx of extra-legal factors, nor does it suggest that well-accepted treaty provisions and established rules of customary international law are susceptible to new challenges ranging from human right outcry to practical concerns of State officials, for the reason that

[T]he lawyer's role is not to facilitate the decision maker's dilemma between law and politics (and, occasionally, between law and morals), but to clarify the legal side of things.²⁸

²⁵ *Case concerning the Continental Shelf (Tunisia v Libya)* [1982] ICJ Rep 18, para 71.

²⁶ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 86. For details, see Chapter 5, section 5.2.2 (b).

²⁷ Paulus and Simma (n 22) 307.

²⁸ *Ibid.*

And so, the essence of legal positivism in contemporary international legal research still lies in the identification and clarification of certain rules of international law, without significantly undermining their original purpose and functions. Legal positivism, as Ratner and Slaughter pointed out, ‘remains the lingua franca of most international lawyers’,²⁹ and the author of this thesis holds the same opinion.

Based on the above understanding of legal positivism, the author of this thesis decides that the chief research method adopted for this thesis is doctrinal research. Indeed, doctrinal research follows the legal philosophy of legal positivism and materialises legal positivism in actual application. This method focuses on the critical examination of legislation and case law, as well as identifying and analysing legal issues based on the examination and interpretation of both primary and secondary sources.³⁰ In essence, this research method requires ‘a critical analysis of the existing literature to inform the researcher of “what is known and not known” about the topic’,³¹ and fulfill the task of identifying the law ‘as it is’.

The author of this thesis considers that adopting doctrinal research as the chief method for the critical analysis of the principle of diplomatic inviolability is appropriate, for the following three reasons. First, it is said that the doctrinal research method is ‘normally a two-part process involving both locating the sources of the law and then interpreting and analysing the text’.³² One of the tasks of this thesis is to explore and examine the specific rules of the principle of diplomatic inviolability. Indeed, a detailed examination of the specific rules of the principle of diplomatic inviolability is the starting point to the

²⁹ Ratner and Slaughter (n 21) 293.

³⁰ T Hutchinson, ‘Doctrinal Research’ in D Watkins and M Burton (eds), *Research Methods in Law* (Routledge 2013) 11-12.

³¹ Ibid 13.

³² Ibid.

further discussion of the theoretical and practical issues related to the principle. Accordingly, the analysis and interpretation of specific provisions in the VCDR is essential to the current research. Thus, the adoption of doctrinal method is well suited to the close examination of the text of the VCDR, as well as to the legal discussion around the drafting process of the VCDR, and interpretation of specific legal terms.

Secondly, it is said that the doctrinal research demands researchers to ‘fit new material into the existing legal framework’, as well as integrating new factual situations ‘with the relevant law and underlying legal principles applicable to a legal area’.³³ In this thesis, the author will not only review the principle of diplomatic inviolability but will also analyse other legal principles and doctrines of international law, such as the doctrine of self-defence. In addition, other norms of international law that are closely related to the principle of diplomatic inviolability, such as the protection of national security and the significant influence of international human rights law, will also be analysed. The impact of other norms of international law on the principle of diplomatic inviolability will be thoroughly discussed in Chapters 5 and 6.

Thirdly, it has been pointed out that doctrinal research is ‘well suited to advocacy and finding solutions to legal problems’.³⁴ Since one of the aims of this thesis is to figure out solutions to the various controversies related to the principle of diplomatic inviolability, it is appropriate to adopt the doctrinal research.

Admittedly, doctrinal research method does have its limitations. As Westerman once pointed out, ‘the legal system itself functions as a theoretical framework that selects facts and highlights them as legally relevant ones’.³⁵ And so, Hutchinson commented

³³ Ibid.

³⁴ Ibid 28.

³⁵ P Westerman, ‘Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law’ in M van Hoecke (ed), *Methodologies of Legal Research Which Kind of Method for What Kind*

that ‘the [doctrinal] researcher’s view is narrowly confined within the box labelled “law” and not concerned with the effects of the law in the world *external* to the black letter box.’³⁶ To overcome such limitations, the author of this thesis will endeavour to analyse the theme of the research within the scope of public international law, rather than merely reflect the so-called ‘insider’s view’ of diplomatic law. As was pointed out above, when analysing the principle of diplomatic inviolability, other relevant international law doctrines and norms will also be discussed so as to critically analyse the applicability of the principle of diplomatic inviolability in various contexts and interpret specific provisions of the VCDR and other relevant international conventions. Hopefully, the successful adoption of the doctrinal research method will not only effectively complete the task of identifying what the specific rules of the principle of diplomatic inviolability are and how to interpret them into various contexts, but also achieve the goal of balancing established norms of diplomatic law and newly developed norms such as the protection of human rights and human life.

Organisation of the thesis

In addition to the current Introduction and the final Conclusion, the thesis will be arranged in three parts and organised in seven chapters. Chapters 1 and 2 form the first part of the thesis, which provides a detailed examination of various fundamental questions related to the theme of the thesis. Chapter 1 will focus on the elaboration of the concept, sources, and scope, as well as the theoretical basis of the principle of diplomatic inviolability. Chapter 2 will explore the origins of the principle and then analyses the historical evolution of the principle in chronological order, from ancient times to the modern day.

of Discipline? (Hart Publishing 2011) 91.

³⁶ Hutchinson (n 30) 15. Emphasis added.

Chapters 3 and 4 form the second part of the thesis, which provides a comprehensive review of the contemporary regime of the principle of diplomatic inviolability, mainly based on related provisions stipulated in the VCDR. In Chapter 3, all of the provisions related to the principle of diplomatic inviolability that are expressly stipulated in the VCDR will be carefully analysed, while in Chapter 4, State responsibility arising from the breach of the international obligations of the principle of diplomatic inviolability by the receiving State will be analysed.

Chapter 5 to Chapter 7 form the third part of the thesis, which deal with the controversies arising from the conflicts between the principle of diplomatic inviolability and other norms of international law in various kinds of scenarios, as well as possible solutions to the controversies. Chapter 5 will focus on the controversies involve the conflicts between the principle of diplomatic inviolability and the protection of national security, public safety and human life, while Chapter 6 will focus on the controversies involve the conflicts between the principle of diplomatic inviolability and the respect of the right to demonstrate and the right of expression. The dilemmas faced by the authorities of the receiving State in controversial scenarios will also be analysed. In Chapter 7, traditional solutions proposed by scholars, as well as alternative solutions will be discussed. Both the merits and shortcomings of these solutions will be evaluated in detail.

Finally, the Conclusion will provide a general summary of the analysis of the thesis. Last but not least, in this final section, an outlook for the future of the principle of diplomatic inviolability will be provided, which will serve as the ultimate findings of the thesis.

The citation style

The author of this thesis adopts Oxford Standard for the Citation of Legal Authorities (OSCOLA) (4th edition) as the citation style.³⁷

³⁷ <http://www.law.ox.ac.uk/publications/oscola.php>.

Chapter 1 The Theoretical Foundations of the Principle of Diplomatic Inviolability

The theme of this research is the principle of diplomatic inviolability. At first glance, the phrase ‘diplomatic inviolability’ seems to be self-explanatory: ‘the application of the concept of inviolability into diplomatic law’. However, to provide an exact definition of such a term is by no means easy. This paradox can be seen through the very fact that as of today, it is extremely difficult to find an exact and specific definition of the term ‘diplomatic inviolability’ (or simply ‘inviolability’) in most of the published dictionaries of international law, or dictionaries of law.¹ Just as Mann incisively points out, ‘The definition of the term has in the past provoked little discussion.’² In addition, in most academic works of diplomatic law, the term ‘diplomatic inviolability’ is usually shadowed by the ubiquitous term of ‘diplomatic privileges and immunities’, and therefore lacks a clear and unambiguous usage of its own. Nevertheless, it is

¹ For example, both edition of the authoritative *Max Planck Encyclopedia of Public International Law* (1st edn, North Holland 1981; 2nd edn, OUP 2012) contains no entry of ‘diplomatic inviolability’. Similarly, the latest edition of Oxford’s *A Dictionary of Law* (7th edn, OUP 2009) and *Longman Dictionary of Law* (7th edn, Longman 2007) contain no entry of ‘diplomatic inviolability’. Although *Parry & Grant’s Encyclopaedic Dictionary of International Law* does contain an entry of ‘inviolability’, it actually quotes the description of the content and scope of the principle of diplomatic inviolability from an early edition of *Satow’s Guide to Diplomatic Practice* (5th edn, Longman 1979) which offers no specific meaning of the term. Apart from those law dictionaries mentioned above, in the latest edition of *A Dictionary of Diplomacy*, the entry ‘diplomatic inviolability’ is cross-referenced to the entry of ‘diplomatic privileges and immunities’, which actually provides a description of the content and scope of the principle of diplomatic inviolability instead of a specific definition of the term. See JP Grant and JC Barker (eds), *Parry & Grant’s Encyclopaedic Dictionary of International Law* (3rd edn, OUP 2009) 313; GR Berridge and L Lloyd, *A Dictionary of Diplomacy* (3rd edn, Palgrave Macmillan 2012) 105, 110-112.

² FA Mann, “‘Inviolability’ and Other Problems of the Vienna Convention on Diplomatic Relations’ in FA Mann, *Further Studies in International Law*(OUP 1990) 326.

acknowledged that most academic authorities of diplomatic law do recognise that ‘diplomatic inviolability’ is a distinct principle of diplomatic law.³ Therefore, this first chapter will aim to delve into the meaning of the concept of ‘diplomatic inviolability’ first, and then proceed to analyse some fundamental theoretical questions regarding the principle of diplomatic inviolability, such as its nature, sources and scope. Finally, the more significant issue — the theoretical basis of the principle of diplomatic inviolability will be explored in detail.

1.1 The Concept and Nature of the Principle of Diplomatic Inviolability

1.1.1 The Concept of ‘Diplomatic Inviolability’

The concept of ‘diplomatic inviolability’ is based on the concept of ‘inviolability’ which derived from the core word ‘inviolable’. As a matter of fact, the word ‘inviolable’ first appeared during the fifteenth century from the Latin word ‘*inviolabilis*’ which means ‘sacrosanct’, or ‘imperishable’.⁴ Indeed, unlike many other words that originated from Latin or Middle English, the literal meaning of the word ‘inviolable’ has not been changed over the past several centuries. Nowadays, the literal meaning of ‘inviolable’ is lucidly defined in some of the most authoritative English language dictionaries as follows:

³ For example, see CE Wilson, *Diplomatic Privileges and Immunities* (The University of Arizona Press 1967) 46-47; B Sen, *A Diplomat’s Handbook of International Law and Practice* (3rd edn, Martinus Nijhoff 1988) 107; SE Nahlik, ‘Development of Diplomatic Law: Selected Problems’, (1990) 222 *Recueil Des Cours* 187, 248.

⁴ See ‘Inviolable’ (Merriam-Webster Dictionary Online) <<http://www.merriam-webster.com/dictionary/inviolable>> accessed 5 June 2014; ‘Inviolabilis’ (Latin Dictionary Online) <<http://www.latin-dictionary.org/inviolabilis>> accessed 2 July 2014. Indeed, the concept of inviolability can be traced back to ancient times but the specific term only came into existence in the fifteenth century.

1) [something] that must be respected and not attacked or destroyed;⁵

2) [an inviolable right, law, principle etc is] extremely important and should be treated with respect and not broken or removed.⁶

Thus, based on the literal meaning of the word ‘inviolable’, its noun form ‘inviolability’ can be properly defined as ‘the status that something is considered as sacrosanct so that it must not be attacked or bothered with, and it should be treated with due respect’.

Whereas the literal meaning of the word ‘inviolability’ is self-explanatory and quite easily understood, the concept of inviolability as applied into the context of diplomatic law is much more complicated. As of today, an exact and perfect definition of ‘inviolability’ in the context of diplomatic law still does not exist, though a concise description of the concept of ‘inviolability’ can be found in one of the authoritative and most cited works of diplomatic law, *Satow’s Guide to Diplomatic Practice*:

The term ‘inviolability’ has two distinct aspects in modern international law. The first is immunity from any legal process or action by the law enforcement officers of the receiving State. The second aspect ... is the duty of protection laid on the receiving State.⁷

Another more elaborated description of the concept of ‘inviolability’ can be found in the definitive commentary work of the Vienna Convention on Diplomatic Relations 1961, that is, Denza’s *Diplomatic Law*, which provides:

Inviolability in modern international law is a status accorded to premises, persons, or property physically present in the territory of a sovereign State but not subject to

⁵ ‘Inviolable’, *Oxford Advanced Learner’s Dictionary of Current English* (6th edn, OUP 2000) 932.

⁶ ‘Inviolable’, *Longman Dictionary of Contemporary English* (4th edn, Pearson Education Limited 2003) 857.

⁷ I Roberts (ed), *Satow’s Diplomatic Practice* (6th edn, OUP 2009) para 8.11, 8.14 and 9.3.

its jurisdiction in the ordinary way. [First], [t]he sovereign State—under the Vienna Convention the receiving State—is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises, persons, or property. [Second], [t]he receiving State is also under a positive duty to protect inviolable premises, persons, or property from physical invasion or interference with their functioning and from impairment of their dignity.⁸

Although both of the above descriptions use the term ‘inviolability’, it is worth pointing out that it is more precise to use ‘diplomatic inviolability’ to denote the meaning of inviolability that applied in diplomatic law, as used in the authoritative *A Dictionary of Diplomacy*.⁹

Analysing the above descriptions of the term ‘diplomatic inviolability’, it can be summarised that the concept of ‘diplomatic inviolability’ contains two distinct aspects. The first aspect, as described in both *Satow’s Guide* and Denza’s *Diplomatic Law*, expresses essentially the same meaning: a legal status of being immune ‘from all interference, whether under colour of law or right or otherwise’¹⁰ from the receiving

⁸ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (3rd edn, OUP 2008) 135.

⁹ Berridge and Lloyd (n 1) 74. Throughout this thesis the term ‘inviolability’ and ‘diplomatic inviolability’ will be used interchangeably. However, it is noteworthy that within the realm of public international law, the term ‘inviolability’ may have other usages in addition to its application in the context of diplomatic law. For instance, it may be used in a ‘less technical sense’ to ‘describe the nature of some core human rights’. See the entry of ‘inviolability’ in Grant and Barker (n 1) 313-314, which marks two distinct usage of the term ‘inviolability’ in modern international law: ‘inviolability’ in a ‘technical sense and applicable to diplomatic law’ and in ‘a less technical sense’ (ie, in international human rights law).

¹⁰ Parry’s words, cited from 7 British Digest of International Law 700, as cited in Mann (n 2) 326. Similarly, Calvo expresses that inviolability ‘is a quality, or status, which renders any person vested with it immune against any form of constraint or proceedings’. See C Calvo, *Le Droit international theorique et pratique* vol VIII (5th edn, Arthur Rousseau 1896) 296, as cited in ‘Codification of the International Law Relating to Diplomatic Intercourse and Immunities, Memorandum prepared by the Secretariat’, YILC [1956] vol II, 161, para 233.

State. In essence, it is a status of immunity from any kind of interference and enforcement, which suggests that there is a passive duty of the receiving State not to take actions against the inviolable persons or things. It can also be inferred that no physical harm can be inflicted upon such inviolable persons and things; neither can their dignity be harmed. Notably, this aspect is similar to the literal meaning of the word ‘inviolability’ mentioned above. Indeed, both the literal meaning of the word ‘inviolability’ and the first aspect of the concept of ‘diplomatic inviolability’ denotes a sacrosanct status that is conferred upon certain things which immune them from any kinds of interference or harm, or in terms of the receiving States, a kind of voluntary restraint from taking actions against something sacrosanct.

While the first aspect of the concept of ‘diplomatic inviolability’ is similar to the literal meaning of the word ‘inviolability’, it is by no means the same case in relation to the second aspect of the term ‘diplomatic inviolability’ described above, that is, the status of being positively protected by the receiving State. Indeed, at a first glance, it seems that neither the literal meaning of the word ‘inviolability’ nor its root word ‘inviolable’ denote any reference to a kind of duty of protection laid upon the receiving State, let alone a positive duty. However, a further close examination of the essence of the first aspect of the concept of ‘diplomatic inviolability’ reveals that, though the literal meaning of the word ‘inviolability’ does not directly suggest that there exists a kind of duty, it can be inferred from the first aspect of the concept of ‘diplomatic inviolability’. Since the first aspect requires a passive duty for the receiving State to refrain from harassing the diplomatic premises and diplomatic agents, it is a natural inference that any kind of harassment from private individuals of the receiving State should also be prevented. After all, without the positive duty of protection from the receiving State, both the diplomatic premises and diplomatic agents will easily be harassed by private individuals of the receiving State, and usually they will fall in victims of radicals of various kinds, such as political extremists, demonstrators, or even individual criminals.

Indeed, Vattel, arguably the first academic to suggest that the status of being positively protected by the receiving State should be incorporated into the concept of diplomatic inviolability,¹¹ incisively pointed out that ‘If their person is not protected from violence of every kind, the right of maintaining embassies becomes of doubtful value and can hardly be exercised with success’, and that the duty of protecting foreign citizens who happen to be in that State is ‘due in a higher degree to a foreign minister’.¹² This conclusion seems to be fairly natural according to Vattel, for the reason that ‘the sovereign should protect every man who happens to be in his States, whether citizen or alien, and protect him secure from all violence’.¹³ Since a public minister represents the character of his sovereign, it is only natural and quite understandable that he enjoys a much higher protection than normal citizens and aliens. Therefore, Vattel asserted that, ‘It is particularly the duty of the sovereign to whom a minister is sent to afford security to the person of the minister’.¹⁴

It is also worth noting that the above analysis of the two aspects of the concept of ‘diplomatic inviolability’ contains one important inference: the first aspect of the concept of ‘diplomatic inviolability’ — the status of being legally immune from all kinds of interference by the receiving State is generally considered as the core element of the concept, and therefore may be properly viewed as the inherent aspect of the concept. The second aspect of the concept of ‘diplomatic inviolability’ — the status of being positively protected by the receiving State is generally considered as a corollary of the first aspect, and it may be properly viewed as derivative. Such a conclusion suggests a twofold relationship between the first and second aspect of the concept of

¹¹ JC Barker, *The Protection of Diplomatic Personnel* (Ashgate 2006) 46.

¹² E de Vattel, *The Law of Nations* (CG Fenwick tr, first published 1758, Oceana 1964) 371.

¹³ Ibid. The term ‘foreign minister’ here refers to the modern term of ‘diplomatic agents’.

¹⁴ Ibid.

‘diplomatic inviolability’. In terms of the sending State, the first aspect is of most significance. It serves as an aegis for its diplomatic premises, diplomatic personnel and diplomatic property against any kind of interference from the receiving State. The second aspect serves as a further strengthening, which provides further insurance of the inviolable status. In terms of the receiving State, the negative duty of refraining from any interference is the principal duty, while the positive duty of protection is an ancillary one. This does not mean that the duty of protection is less important than the passive duty of not interfering. It merely reflects the different necessity when the receiving State applies the concept of diplomatic inviolability into practice. In a word, both the first and second aspects are indispensable to the concept of ‘diplomatic inviolability’, and both should be incorporated to the definition of ‘diplomatic inviolability’.

To sum up, a proposed definition of the concept of ‘diplomatic inviolability’ can be expressed as: A legal status conferred upon certain things and personnel of the sending State, which not only grants them being immune from any kinds of interference or harm by the receiving State but also requires being positively protected by that State.

1.1.2 The Nature and Concept of the Principle of Diplomatic Inviolability

It is important to note that the aforementioned concept of diplomatic inviolability merely denotes an abstract legal status. It is only through specific rules that the abstract legal status of diplomatic inviolability can be achieved in practice. In legal terminology, it is generally acceptable that the word ‘principle’ is a suitable term for referring to something ‘inherent in or developed from a particular body of law’.¹⁵ Such a principle is used to describe ‘a binding legal statement which describes obligations of conduct or obligations to achieve an objective’¹⁶. As to the principle of diplomatic inviolability, the

¹⁵ R Wolfrum, ‘General International Law (Principles, Rules and Standards)’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol IV, 344, para 7.

¹⁶ Ibid para 6.

use of the term ‘principle’ denotes those rules which constitute a particular legal source of the application of diplomatic inviolability, so as to make it clear the extent to which certain people and things from the sending State enjoy an inviolable status, as well as specifying the extent to which certain obligations should be observed by the receiving State. And so, the term ‘principle of diplomatic inviolability’ can be properly defined as: A set of core legal rules that deal with the application of the concept of diplomatic inviolability. Admittedly, the term ‘principle of diplomatic inviolability’ has been widely mentioned in academic writings,¹⁷ as well as various law reports and public documents.¹⁸

To consider ‘diplomatic inviolability’ as a legal principle has two important implications. First, it acknowledges that the rules concerning diplomatic inviolability are the most essential ones that underlie the infrastructure of modern diplomatic law. As Fauchille points out, ‘[T]he whole subject [of diplomatic law] is dominated by the principle of inviolability ... This is the fundamental principle ...’¹⁹ Similarly, Barker points out that, ‘[I]t is true to say that diplomatic inviolability is the cornerstone of modern diplomatic privileges and immunities’.²⁰ Silva also remarks that ‘inviolability is the fundamental principle from which all diplomatic privileges and immunities have been derived’.²¹ Indeed, this aspect can also be reflected by the very fact that the rules

¹⁷ For example, see note 3 above. See also MN Shaw, *International Law* (6th edn, CUP 2008) 764; L Dembinski, *The Modern Law of Diplomacy* (Martinus Nijhoff 1988) 191; M Hardy, *Modern Diplomatic Law* (Manchester University Press 1968) 51; GEDNE Silva, *Diplomacy in International Law* (Sijthoff 1972) 89, 91 and 97; Denza (n 8) 257; Nahlik (n 3) 248-250. More often than not, the term is stated as ‘principle of inviolability’ in those academic works of diplomatic law.

¹⁸ For instance, see EC Surette, ‘Applicability of Diplomatic Immunity Under Vienna Convention and Diplomatic Relations Act’ (2005) 1 ALR Fed 2d 351, Section I. §2, para 4.

¹⁹ P Fauchille, *Traité de Droit International Public* (8th edn, Arthur Rousseau 1926) vol I, 60, as cited in ‘Codification of the International Law Relating to Diplomatic Intercourse and Immunities, Memorandum prepared by the Secretariat’ (n 10) 161, para 233.

²⁰ Barker (n 11) 2.

²¹ Silva (n 17) 91.

pertaining diplomatic inviolability form many of the core articles in the VCDR.²² Secondly, to consider ‘diplomatic inviolability’ as a principle suggests that the rules concerning diplomatic inviolability occupy a fairly significant position in the realm of public international law. For one thing, the principle of diplomatic inviolability is among the ‘oldest known principle of international law altogether’.²³ In addition, it can also be supported by the very fact that the rules concerning diplomatic inviolability frequently became the focus of official or private attempts at the codification of international law since the 19th century,²⁴ and, not surprisingly, after the establishment of the International Law Commission, these rules became a priority topic for drafting.²⁵

Although the significance of the principle of diplomatic inviolability is well agreed among academics of international law, its nature is still at issue. For instance, some scholars claim that diplomatic inviolability is actually a kind of diplomatic privilege;²⁶ some others assert that diplomatic inviolability is better to be regarded as a sub-category of diplomatic immunity.²⁷ Such divergence actually originates from the academic debate on the different meanings between the word ‘privilege’ and ‘immunity’. During the discussion of ILC’s Draft Articles on Diplomatic Intercourse and Immunities,

²² To be specific, Article 22 stipulates the inviolability of diplomatic premises; Article 24 stipulates the inviolability of diplomatic archives; Article 27 stipulates the inviolability of diplomatic correspondence; Article 29 stipulates the inviolability of diplomatic agents; Article 30 stipulates the inviolability of residence and property of diplomatic agents; and finally, Article 37 stipulates the inviolability of other personnel such as the members of the family of the diplomatic agents as well as administrative and technical staff.

²³ Nahlik (n 3) 248. See also Silva (n 17) 89.

²⁴ For details of these codification attempts, see Chapter 2, section 2.2.4.

²⁵ UNGA Res 685 (VII) (5 December 1952).

²⁶ Nahlik (n 3) Chapter II in which he puts the analysis of the principle of diplomatic inviolability under the title of ‘Privileges’. See also Vattel (n 12) 375, where he expressly says that ‘inviolability...is not [an ambassador’s] only privilege’.

²⁷ For instance, see ‘Codification of the International Law Relating to Diplomatic Intercourse and Immunities, Memorandum prepared by the Secretariat’ (n 10) 161, para 231.

Verdross held the opinion that ‘it would be preferable to speak of “diplomatic privileges” only’, for the reason that ‘immunities were included in those privileges’.²⁸ However, most of the other members of the ILC preferred to keep the difference between privileges and immunities. For instance, Bartos

recalled that there had been a prolonged discussion of the difference between privileges and immunities during the drafting of the Convention on the Privileges and Immunities of the United Nations. It had been decided to maintain a distinction between them, on the ground that immunities generally had a legal basis, whereas only some privileges were based on law, the others being a matter of courtesy.²⁹

According to Silva, the word ‘privileges’ has ‘an over-all meaning embracing all the inviolabilities, immunities and exemptions’.³⁰ Indeed, both diplomatic inviolability and diplomatic immunity are a kind of extraordinary status conferred upon the people and things of the sending State,³¹ thus make them a kind of ‘privilege’ per se. However, the distinction between the usage of ‘diplomatic privileges’ and ‘diplomatic immunities’ was maintained by the ILC,³² which leaves the terms available for use today.

Although it is now less debatable that ‘diplomatic inviolability’ can be subsumed into the ubiquitous category of ‘diplomatic privileges and immunities’, it is worth noting that

²⁸ YILC [1957] vol I, 52, para 4.

²⁹ Ibid, para 11.

³⁰ As cited in Silva (n 17) 89 at which Silva thinks personally that such a suggestion ‘should have been accepted’.

³¹ LT Lee and J Quigley, *Consular Law and Practice* (3rd edn, OUP 2008) 341.

³² For instance, it is suggested that ‘immunities generally had a legal basis, whereas only certain privileges were based on law’. See *ibid*. See also Satow’s classic distinction between these two terms, in Roberts (n 7) para 9.1 in which he says ‘in general a privilege denotes some substantive exemption from laws and regulations...whereas an immunity does not imply any exemption from substantive law but confers a procedural protection from the enforcement process’. Therefore, the so-called ‘*droit de chapelle*’ and the exemption of local taxations can only be regarded as a kind of diplomatic privilege, not diplomatic immunity’.

a distinction between ‘diplomatic inviolability’ and ‘diplomatic immunity’ is helpful for legal considerations. The distinction between ‘inviolability’ and ‘immunity’ can be explained with the following four points. First, as it has been pointed out earlier, both diplomatic inviolability and diplomatic immunity can be regarded as a kind of privilege per se. However, the emphasis of these two privileges is remarkably different. During the aforementioned discussion of the difference between ‘diplomatic privileges’ and ‘diplomatic immunities’ in the ILC, the Chairman, Zourek pointed out that:

The term ‘immunity’ had been associated since the Middle Ages with the idea of exemption from local jurisdiction. Privileges, or prerogatives, were something different. They were prerogatives based on international law, customary or written, and gave the diplomatic agents positive rights which other inhabitants of the receiving State did not possess.³³

Since diplomatic inviolability can be regarded as a kind of privilege, it is not difficult to identify the difference based on Zourek’s comment. For example, the second aspect of diplomatic inviolability requires the special protection of diplomatic premises, agents and property by the receiving State. Such protection indicates not only a kind of ‘positive right’ of relevant persons, premises or property of the sending State, but also indicates a duty on the receiving State. And so, inviolability can easily be distinguished from the immunity from jurisdiction of local courts in this aspect. Secondly, it is recognisable that according to Article 32 of the VCDR, diplomatic immunity³⁴ can be waived by the sending State either voluntarily or upon request from the receiving State. On the contrary, there is no provision mentioning or suggesting the possibility of waiver of diplomatic inviolability. Admittedly, if the head of a diplomatic mission provides the necessary consent to the authorities of the receiving State, he or she essentially does ‘waive’ the first aspect of inviolability. However, it is almost inconceivable that the

³³ YILC [1957] vol. I, 52, para 13.

³⁴ To be specific, here diplomatic immunity includes both the immunity from jurisdiction and immunity from execution.

second aspect of inviolability, ie, the protection aspect would ever be voluntarily waived. Thirdly, it can be recognised that diplomatic inviolability normally requires the immediate reaction by the authorities of the receiving State, while diplomatic immunity usually deals with the less urgent issue of procedure in front of a local court. Fourthly, even from a linguistic perspective, the two terms are different from one another.³⁵ Therefore, it is quite clear that the maintenance of the different usage of ‘diplomatic inviolability’ and ‘diplomatic immunity’ is not only necessary but also of significant value. Interestingly, though the distinction between ‘diplomatic privileges’ and ‘diplomatic immunities’ were elaborated during the discussion in the ILC, there was no detailed discussion on the distinction between ‘diplomatic inviolability’ and ‘diplomatic immunity’ in either the ILC or at the Vienna Conference.

1.2 The Sources and Scope of the Principle of Diplomatic Inviolability

1.2.1 The Sources of the Principle of Diplomatic Inviolability

In legal terminology the word ‘source’ may denote two meanings: ‘it may refer to either the historical, ethical, social, or other bases for a legal rule, or it may refer to legal rules as such’.³⁶ In the context of this thesis, the former one will be discussed in Sections 1.3 and 2.1, while the latter one will be discussed in the following paragraphs.

³⁵ ‘Immunity’ indicates ‘the fact not being affected by ... something unpleasant’. See ‘Immunity’ in *Longman Dictionary of Contemporary English* (n 6) 979. For the dictionary definition of ‘inviolability’, see n 5 and n 6 above. In French, the word ‘inviolabilité’ not only means ‘immunity’ but also has the meaning of ‘sacredness’, while the French word ‘immunité’ has the same meaning in English. Interestingly, in Chinese, the meaning of the term “不可侵犯” (inviolability) is totally different from “豁免” (immunity). The former means ‘not to be attacked’ while the latter means ‘free from tax or servitude’. See “不可侵犯” (在线新华词典) <<http://xh.5156edu.com/html5/145063.html>>; “豁免” (在线新华词典) <<http://xh.5156edu.com/html5/263326.html>> accessed 30 June 2014. The Japanese translations of these two terms, “不可侵” and “免除” are also similar to the Chinese meanings.

³⁶ R Wolfrum, ‘Sources of International Law’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol IX, 299, para 1.

According to the traditional point of view, the sources of international law can be identified in Article 38.1 of the Statute of International Court of Justice,³⁷ where the article lists five major sources of international law: treaty, international custom, general principles of law, and, as subsidiary sources of law, judicial decisions and legal writings. Since the principle of diplomatic inviolability is an underlying principle of diplomatic law and public international law, it is understandable that its source can also be identified within the aforementioned five sources of international law in Article 38.1 of the ICJ Statute, which will be discussed in turn as follows:

First of all, considering that the principle of diplomatic inviolability is one of the oldest established principles of diplomatic law, it is well understandable that customary international law is the most important source of the principle. Indeed, the principle of diplomatic inviolability has been recognised and observed as binding by almost all States for so long a time that the principle has become the quintessence of customary international law.³⁸ As will be pointed out in the next Chapter, the principle of diplomatic inviolability gradually evolves through history, and during that process, customary international law plays a significant role. In fact, most, if not all of the specific rules of the principle of diplomatic inviolability in contemporary legal regime under the VCDR are well-established customary international law rules long before the adoption of the VCDR. Notably, the Preamble to the VCDR also confirms that ‘people of all nations from ancient times have recognized the status of diplomatic agents’. Here the ‘status’ actually refers to the inviolable status of diplomatic agents. Admittedly, with the adoption of the VCDR, most customary international law rules of the principle of diplomatic inviolability have been codified into treaty law. However, the remaining significance and relevance of customary international law as one of the major sources of

³⁷ Hereafter referred as the ‘ICJ Statute’.

³⁸ Denza (n 8) 256-257. So also Chapter 2 for the historical evolution of the principle of diplomatic inviolability.

the principle of diplomatic inviolability should not be underestimated. Indeed, the Preamble to the VCDR expressly mentions that:

[T]he rules of customary international law should continue to govern questions not expressly regulated by the provision of the present Convention'.³⁹

In addition to customary international law, it can be recognised that the rules of principle of diplomatic inviolability have been well stipulated in various multilateral international conventions to which a substantial number of States are parties, and undoubtedly, the VCDR is the most important treaty law source of the principle of diplomatic inviolability.⁴⁰ The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1973⁴¹ also makes it clear that the inviolability of diplomatic agents is of vital importance.⁴² Thus, these multilateral conventions form another important source of the principle of diplomatic inviolability.

Supplement to the above two major sources, certain general principles of law may also be regarded as a source of the principle of diplomatic inviolability. For example, there is a well-known general principle of law that 'the breach of an engagement involves an obligation to make reparation in an adequate form'.⁴³ This principle is especially

³⁹ See the fifth paragraph of the Preamble.

⁴⁰ That being said, it is worth noting that before the adoption of the VCDR, there were many treaties expressly stipulated relevant rules of the principle of diplomatic inviolability, such as the bilateral treaties between China and European States during the second half of the nineteenth century. See the 'Introductory Comment of the Harvard Research Draft Convention on Diplomatic Privileges and Immunities' (1932) 26 AJIL Sup 15, 26, 30-31. Notably, Article 14 of the Havana Convention on Diplomatic Officers 1928 also specifically stipulated the principle of diplomatic inviolability.

⁴¹ 1035 UNTS 107 (adopted 14 December 1973, entered into force 20 February 1977). Hereafter the 'IPP Convention'

⁴² Preamble and Article 2.3 of the IPP Convention.

⁴³ *Chorzow Factory Case (German v Poland)*, PCIJ Series A, No. 9 (1927) para 55.

remarkable in cases concerning a breach of the principle of diplomatic inviolability. Thus, after the infamous NATO bombing of the Chinese Embassy in Belgrade in May 1998, the US government paid compensation of \$28 million to the Chinese government for the damage of its embassy.⁴⁴ Indeed, this specific general principle of law emphasizes the inviolable status of diplomatic premises and diplomatic personnel.

Fourthly, judicial decisions from international courts and tribunals concerning breaches of the principle of diplomatic inviolability can be regarded as another indispensable, albeit subsidiary, source of the principle of diplomatic inviolability. The most conspicuous cases in contemporary times are the *Tehran Hostages Case*⁴⁵ and the *Armed Activities on the Territory of the Congo Cases*.⁴⁶ These two ICJ cases reiterate the significance of the principle of inviolability, and the judgements themselves can provide evidence of the existence of customary international law and will be considered in more depth later in this thesis.

Last but not least, writings of leading diplomatic law scholars may also be regarded as a valuable subsidiary source of the principle of diplomatic inviolability. During the so-called Classical Periods of the seventeenth and eighteenth century, writings of eminent legal authorities such as Grotius, Bynkershoek and Vattel played a significant role in the development of the principle of diplomatic inviolability.⁴⁷ For instance, Young has once argues that ‘In Vattel the customary law has developed as far as it was ever to do unaided’.⁴⁸ Admittedly, thanks to the codification of diplomatic law since the late

⁴⁴ Denza (n 8) 166.

⁴⁵ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3.

⁴⁶ *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168.

⁴⁷ See Chapter 2, section 2.2.3.

⁴⁸ E Young, ‘The Development of the Law of Diplomatic Relations’ (1964) 40 BYIL 141,164.

nineteenth century, the influence of legal authorities has been gradually declining. However, even nowadays, the writings of eminent scholars of diplomatic law such as the work of Denza still provide valuable opinions on the theory and practice of the principle of diplomatic inviolability. It is proper to assert that the writings of eminent international law scholars may continue to serve as an important supplementary source of the principle of diplomatic inviolability in the future.

1.2.2 The scope of the principle of diplomatic inviolability

Based on relevant articles in the VCDR, as well as customary international law and writings of diplomatic law scholars, it can be briefly summarised here that the material scope of the principle of diplomatic inviolability under contemporary diplomatic law covers mainly three categories.⁴⁹ The first category deals with the inviolability of diplomatic premises. This obviously includes the inviolability of the premises of a diplomatic mission and the inviolability of private residence of a diplomatic agent.⁵⁰ The second category deals with the inviolability of diplomatic property, which includes the official archives of diplomatic missions, as well as diplomatic correspondence such as diplomatic mail and the diplomatic bag.⁵¹ This category also includes personal property of diplomatic agents.⁵² The third category is the personal inviolability conferred upon a certain group of people who are termed as ‘diplomatic personnel and their families’. To be specific, this category includes the personal inviolability of diplomatic agents as defined under Article 1(e) of the VCDR, the personal inviolability of their family members as per Article 37.1, the personal inviolability of certain junior

⁴⁹ See Fauchille’s excellent summary, as cited in ‘Codification of the International Law Relating to Diplomatic Intercourse and Immunities, Memorandum prepared by the Secretariat’ (n 10) 161, para 236 (a) - (c). Note that in the current section the discussion is limited to the material scope of the principle of diplomatic inviolability. The temporal scope and other issues will be discussed in Chapter 3.

⁵⁰ Articles 22 and 30.1 of the VCDR respectively.

⁵¹ Articles 24, 27.2, 27.3 and 27.4 of the VCDR.

⁵² Article 30.2 of the VCDR.

staff and their family members as per Article 37.2, and finally, under the VCDR, the personal inviolability of a diplomatic courier.⁵³

It is worth noting that the above order of the three categories in the VCDR is not as the same order of how the principle of diplomatic inviolability developed historically. As a matter of fact, it was the personal inviolability of diplomatic agents that was first established as a core element of the principle of diplomatic inviolability. Then, during the Renaissance, when resident embassies began to emerge as a systematic practice, the inviolability of diplomatic premises and diplomatic property began to be incorporated into the component of the principle of diplomatic inviolability. As Vattel incisively points out:

All the reasons which demand his personal independence and inviolability concur thus in securing the immunity of his house.⁵⁴

A detailed survey of the historical evolution of the principle of diplomatic inviolability will be provided in the next chapter whereas the analysis of the stipulation of the contemporary legal regime of the principle of diplomatic inviolability will be elaborated in Chapter 3.

1.3 The Theoretical Basis of the Principle of Diplomatic Inviolability

The importance of the theoretical basis⁵⁵ of diplomatic privileges and immunities has been emphasized by almost all eminent writers of diplomatic law ever since the

⁵³ Article 27.5 of the VCDR. See also Article 16 of ‘Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier, YILC [1989] vol II. Hereafter referred as ‘the Draft Articles on Diplomatic Courier and Diplomatic Bag 1989’.

⁵⁴ Vattel (n 12) 394.

⁵⁵ The theoretical basis of the principle of diplomatic inviolability should be distinguished from the origins of the principle of diplomatic inviolability. The theoretical basis deals with the *raison d’être* of the principle (the ‘why’ question), whereas the origins deal with the factual backgrounds that in what way the principle begin to emerge (the ‘how’ question). For details of the origins of the principle of diplomatic

‘Classical Periods’ of the seventeenth and eighteenth century.⁵⁶ According to one commentator, ‘at least a dozen juristic theories have been advanced to justify the extension of diplomatic privileges and immunities’.⁵⁷ However, it is now well recognised by scholars that three theories may be the most plausible theoretical basis for diplomatic privileges and immunities.⁵⁸ They are the theory of ‘representative character’,⁵⁹ the theory of ‘extraterritoriality’⁶⁰ and the theory of ‘functional necessity’. Although all of these three theories can be used as the theoretical basis for the general aspects of diplomatic privileges and immunities, in this thesis, the focus will be limited to their usage as the theoretical basis for the principle of diplomatic inviolability. After all, the principle of diplomatic inviolability is one of the core concepts among the ubiquitous term of ‘diplomatic privileges and immunities’, and therefore, it is natural and justified that the theoretical basis for diplomatic privileges and immunities can be used effectively to provide explanations for the juridical foundations of the principle of diplomatic inviolability.⁶¹ In the following subsections, the above mentioned three theories will be analysed in turn.

inviolability, see Chapter 2, section 2.1.

⁵⁶ For example, see H Grotius, *De Jure Belli ac Pacis* (FW Kelsey tr, first published 1625, Oceana 1964) Book II, Chapter XVIII; C van Bynkershoek, *De Foro Legatorum* (GJ Laing tr, first published 1946, Oceana 1964) Chapter V; See also Vattel (n 12) Book IV, Chapter VII (especially in section 92).

⁵⁷ Wilson (n 3) 1.

⁵⁸ Ibid. See also M Ogdon, *Bases of Diplomatic Immunity* (John Byrne & Company 1936) 62.

⁵⁹ This theory is also known as the theory of ‘personal representation’. See Wilson (n 3) 1.

⁶⁰ Sometimes ‘extraterritoriality’ is spelt as ‘extraterritoriality’. See Roberts (n 7) para 8.3.

⁶¹ It can be argued that the theoretical basis for the principle of diplomatic inviolability may actually be the foremost and initial basis for the whole concept of diplomatic privileges and immunities, as analysed in the following paragraphs as well as in Chapter 2.

1.3.1 The Theory of ‘Representative Character’ as a Theoretical Basis of the Principle of Diplomatic Inviolability

The theory of ‘representative character’ is arguably the oldest among the three major theories of diplomatic law.⁶² According to the traditional explanation of this theory, the diplomatic agent is regarded as the personification of the sovereign from whom he is sent.⁶³ In its modern form, it means the diplomatic mission, as well as the diplomatic agent, personifies the sending State.⁶⁴ Although the theory can be used to explain the legal basis for diplomatic privileges and immunities in general, a close examination of the historical evolution of the principle of diplomatic inviolability reveals that this theory has a very strong link with the principle of diplomatic inviolability, and personal inviolability in particular. In Ogdon’s words, ‘[t]he inviolability of the person of a diplomatic representative has been widely held to be derivable from and determinable by the respect due to [sic] the sovereign sending the agent’.⁶⁵ Indeed, evidence of the practice of this theory can be traced back to ancient India and ancient Greece, and during the Middle Ages the actual practice of this theory had already been widely recognised in the canon law.⁶⁶ Nevertheless, it was during the Classical periods of the seventeenth and eighteenth century that the theory as a legal basis of the principle of diplomatic inviolability had been established and refined, thanks to several eminent

⁶² Wilson (n 3) 1-2.

⁶³ Ibid 1. According to Ogdon, there are at least four versions of this theory and each of them can ‘ultimately traces immunity to the sovereignty of the State which sends the agent’. See Ogdon (n 58) 105.

⁶⁴ ‘Draft Articles on Diplomatic Intercourse and Immunities, Text and Commentary’, YILC [1958] vol II, 95. Hereafter referred to as ‘Commentary on the 1958 Draft Articles’.

⁶⁵ Ogdon (n 58) 121.

⁶⁶ It may be speculated that the earliest form of the theory of ‘representative character’ had emerged from ancient religion. For example, in ancient Greece, heralds, messengers and later envoys were regarded as ‘messengers from the God’ and therefore be granted inviolability. Then, during the Middle Ages, envoys from the Pope (‘papal legates’) were regarded as personification of the Pope himself and it was no doubt that he enjoyed personal inviolability. See Chapter 2, section 2.1.2 and 2.2.2 for details.

writers on diplomatic law.⁶⁷ In the first place, Grotius in his chapter ‘On the Right of Legation’ contended that

[T]he safety of ambassadors is placed on an extremely precarious footing if they are under obligation to render account of their acts to any other than the one by whom they are sent ... Ambassadors as if by a kind of fiction are considered to represent those who sent them.⁶⁸

Grotius’s argument was limited to the first aspect of diplomatic inviolability, that is, the immunity from being interfered with by the authorities of the receiving State. It seems that Grotius failed to provide any concrete reason for why ambassadors need positive protection by the receiving State. Actually, it was the theorists of the eighteenth century that consummated the explanation. In *De Foro Legatorum*, Bynkershoek incisively points out that:

[I]t seems as if it must be said that their sanctity bestows on ambassadors protection from offensive word or deed, because they are the representatives everywhere of their prince.⁶⁹

More importantly, Vattel provided an elaborated analysis on how the theory of representative character provides a legal basis for diplomatic inviolability. In the first place, he focused on the second aspect of diplomatic inviolability by pointing out the very reason why there exists a positive protection of ambassador:

The respect which is due to sovereigns should reflect upon their representatives, and particularly upon an ambassador, as representing the person of his master in the highest degree...It is particularly the duty of the sovereign to whom a minister

⁶⁷ Barker (n 11) 41-43.

⁶⁸ Grotius (n 56) 443.

⁶⁹ Bynkershoek (n 56) 27.

is sent to afford security to the person of the minister. To receive a minister in his representative capacity is equivalent to promising to give him the most particular protection and to see that he enjoys all possible safety.⁷⁰

Vattel then went on to argue that the theory of ‘representative character’ provided a legal basis for the first aspect of diplomatic inviolability by emphasizing the legal consequence of disregarding the inviolable status of a public minister:

[If an act of violence] is committed against a public minister it becomes a crime of State and an offense against the Law of Nations, and the right to pardon ... belongs to the sovereign who has been offended in the person of his minister.⁷¹

Therefore, by analysing the two aspects of diplomatic inviolability, Vattel expressly explained how the theory of ‘representative character’ provides a solid legal basis for the personal inviolability of diplomatic agents.

Finally, with regard to the inviolability of diplomatic premises and diplomatic property, the theory of ‘representative character’ can still be invoked as a basis for such inviolability. It can be argued that the inviolability of diplomatic premises and property is the natural extension or derivation of the inviolability of personal inviolability of diplomatic agents. According to Vattel:

The ambassador’s house should be safe from all insult, and should be specially protected by the laws of the State and by the Law of Nations; to insult it is to commit a crime against the State and against all Nations.⁷²

⁷⁰ Vattel (n 12) 371.

⁷¹ Ibid.

⁷² Ibid 394.

1.3.2 The Theory of ‘Exterritoriality’ as a Legal Basis of the Principle of Diplomatic Inviolability

A second explanation of the legal basis of the principle of diplomatic inviolability comes from the theory of ‘exterritoriality’. As a matter of fact, the theory of ‘exterritoriality’ emerged as a major theory of diplomatic law at almost the same time as the theory of ‘representative character’.⁷³ According to the explanation of this theory, a diplomatic agent is by a kind of fiction treated as if he still lived in the sending State and thus regarded as if he was outside the territory of the State to which he is accredited. Similarly, the diplomatic premises are treated as a kind of enclave as if they were located outside the territory of the receiving State.⁷⁴ According to Grotius, the individual usually wrongly credited as the originator of this theory:⁷⁵

[A]mbassadors were held to be outside of the limits of the country to which they were accredited. For this reason they are not subject to the municipal law of the State with which they are living.⁷⁶

With regard to the issue of why diplomatic agents enjoy the status of inviolability, Grotius argued that due to their extraterritorial status, ambassadors can only be sent back to the receiving State for punishment even though an atrocious crime was committed. This conclusion obviously precludes the possibility of punishing or taking forcible measures against ambassadors. Therefore, the personal inviolability of ambassadors should be strictly observed. Just as Grotius asserted,

⁷³ JC Barker, ‘The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods’ (1995) 3 *Diplomatic & Statecraft* 593, 600.

⁷⁴ Wilson (n 3) 5-7; Ogdon (n 58) 63.

⁷⁵ In fact it was Ayrault that first used this theory to explain the position of ambassadors. See Young (n 48) 151; Ogdon (n 58) 68-69. See also Barker, ‘The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods’ (n 73) 601.

⁷⁶ Grotius (n 56) 443.

Everywhere, in fact, we find the mention of ... the inviolability of ambassadors, the law of nations which is to be observed with reference to ambassadors ... is that they be free from violence'.⁷⁷

Indeed, just as Adair concluded:

[T]hroughout the sixteenth and seventeenth centuries, so far as can be discovered, no ambassador was ever put to death, nor even subjected to any very prolonged imprisonment for crimes committed.⁷⁸

Whereas Grotius had never expressly mentioned that extritoriality may render the inviolable status of diplomatic premises,⁷⁹ it was state practice during the sixteenth and seventeenth century that actually confirmed such inviolability. In the wake of claiming absolute state sovereignty since the sixteenth century, the practice of granting inviolable status to the diplomatic premises emerged from the theory of 'extritoriality' and gradually be established as an accepted practice,⁸⁰ and ultimately became accepted as customary international law in the eighteenth century.⁸¹ Thus, according to Vattel, 'in all ordinary cases the ambassador's house, like his person, is regarded as being outside the territory [of the receiving State]'.⁸²

⁷⁷ Ibid 438 and 440.

⁷⁸ ER Adair, *The Extritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (Longmans 1929) 64.

⁷⁹ Ibid 201.

⁸⁰ Ogdon (n 58) 63-67. See also Barker (n 73) 603. According to various writers, it was during this period that the so-called '*franchise du quartier*' was established in some part of Europe. Such an extraordinary regime was directly originated from the theory of extritoriality and it objectively reinforced the inviolability of diplomatic premises to an exaggerating manner. Though this regime was disappeared in Europe by the eighteenth century, the inviolability of diplomatic premises was preserved as a legal rule and became a rule of the customary international law. See Adair (n 78) 198-199.

⁸¹ Roberts (n 7) para 8.9.

⁸² Vattel (n 12) 394.

A final aspect is the inviolability of diplomatic property. The reason why the personal property of diplomatic agents is inviolable under the theory of 'extritoriality' was provided by Ogdon. He asserted that the inviolable status of the personal property of the ambassador can be directly traced to the theory of 'extritoriality', for the reason that 'the personal effects were sometimes regarded as belonging to, or being closely associated with the domicile of the owner'.⁸³ According to the theory of 'extritoriality' the ambassador himself is regarded as being outside the territory of the receiving State, therefore, as a natural result, the ambassador's personal property should be 'exempt from the seizure in the State to which he was accredited'.⁸⁴

1.3.3 The Theory of 'Functional Necessity' as a Legal Basis of the Principle of Diplomatic Inviolability

The theory of 'functional necessity' is arguably the most plausible theory among the three major theories of diplomatic law.⁸⁵ According to this theory, diplomatic agents are granted with certain privileges and immunities so that they are able to perform their diplomatic functions properly and effectively.⁸⁶ Indeed, it has been pointed out by Barker as well as Wilson that the practice of observing the inviolability of diplomatic agents based on necessity predated the rise of resident embassy.⁸⁷ Nevertheless, it was during the seventeenth and eighteenth century that the theory was gradually refined as an influential theoretical basis of the principle diplomatic inviolability. The rationale can be explained from the following aspects:

⁸³ Ogdon (n 58) 81.

⁸⁴ Ibid.

⁸⁵ Roberts (n 7) para 8.3. See also 'Commentary on the 1958 Draft Articles' (n 65) 95.

⁸⁶ Barker, 'The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods' (n 73) 604.

⁸⁷ Ibid; Wilson (n 3) 17.

Firstly of all, the theory of ‘functional necessity’ can easily explain the personal inviolability of diplomatic agents. It is argued by various authorities that without personal inviolability, an ambassador can hardly perform his diplomatic function effectively. The reason was elaborated by Grotius:

[T]he safety of ambassadors is placed on an extremely precarious footing if they are under obligation to render account of their acts to any other than the one by whom they are sent. For since the views of those who send the ambassadors are generally different from the views of those who receive them, and often directly opposed, it is scarcely possible that in every case something may not be said against an ambassador which shall present the appearance of a crime.⁸⁸

Moreover, Bynkershoek argued that if the ambassador was punished for his delinquency, ‘and even though he has not been guilty of any crime, you expose him in unlimited degree to accusation of all sorts’.⁸⁹ Consequently, the whole good of the embassy’ will be endangered. More expressly, it was Vattel who ardently emphasized the significance of the personal inviolability as an indispensable necessity to carry out diplomatic functions:

[Ambassadors and other public ministers] can not [sic] accomplish the object of their appointment unless they are endowed with all the prerogatives necessary to perform the duties of their charge safely, freely, faithfully and successfully ... [I]f an ambassador could be indicted for ordinary misdemeanours, and criminally prosecuted, imprisoned, and punished...it would often happen that he would have neither the power, nor the time, nor the freedom of mind which the affairs of his sovereign required.⁹⁰

⁸⁸ Grotius (n 56) 443.

⁸⁹ See Bynkershoek (n 56) 93.

⁹⁰ Vattel (n 12) 376. Although Vattel intended to use this paragraph to elaborate the immunity from jurisdiction of the ambassadors, it is worth noting that the same reason applies to the personal

Secondly, the theory of ‘functional necessity’ can conveniently be used as a justification of the inviolability of diplomatic premises. Since diplomatic premises are the places where a diplomatic mission is located as well as where the diplomatic agents usually live, if these places are not inviolable, then they will be easily be harassed by the authorities of the receiving State, and consequently the ordinary work of the mission as well as the diplomatic agents will be severely hampered. In a word, the inviolability of diplomatic premises is quite essential for both the diplomatic mission and the diplomatic agents to carry out their ordinary functions. Thus, according to Vattel:

The independence of the ambassador would be very imperfect and his inviolability very insecure if the house in which he dwells did not enjoy a complete immunity, and if it was not inaccessible to the ordinary officers of justice. The ambassador could be troubled under a thousand pretexts, his secrets might be discovered by a search of his papers, and his person exposed to insult.⁹¹

Thirdly, the theory of ‘functional necessity’ is a convincing theory to explain the inviolability of diplomatic properties. It is conceivable that if the property of a diplomatic agent can be easily searched or seized by authorities of the receiving State, then the diplomatic agent may not effectively make use of those things that are essential to his daily work. Thus, Grotius had asserted that

[T]he movable goods of an ambassador ... cannot be seized as security, or in payment of debt or by order of the court, or, as some claim, by the hand of the king. For an ambassador ought to be free from all compulsion – such compulsion as

inviolability of diplomats. After all, usually the arrest of the concerning ambassador is the prerequisite before attending the legal proceedings.

⁹¹ Ibid 394.

affects things of which he has need as well as that which touches his person – in order that he may have full security.⁹²

Obviously, the above reason can be conveniently applied also to the property of diplomatic mission. If the official archives, correspondence and means of transport do not enjoy inviolable status, then whether the diplomatic mission can fully make use of these things to carry out their respective functions will be quite dubious.

Last but not least, the theory of ‘functional necessity’ can sufficiently explain why diplomatic agents and diplomatic premises require positive protection. Undoubtedly, without the special protection, neither the diplomatic premises nor the diplomatic agents can be secure enough from various kinds of harassment or assault from which their normal diplomatic functions will be greatly disturbed or even paralysed. As a matter of fact, it was Vattel who first mentioned the necessity positively to protect diplomatic agents in order to ensure the right of embassy.⁹³ Vattel especially emphasized the link between the protection of diplomatic agents and the diplomatic functions:

[A]mbassadors and other ministers should be put in a position of perfect safety and inviolability; for if their person is not protected from violence of every kind, the right of maintaining embassies becomes of doubtful value and can hardly be exercised with success.⁹⁴

For the same reason, Vattel pointed out that the diplomatic premises should also be specially protected.⁹⁵

⁹² Grotius (n 56) 448.

⁹³ Barker, *The Protection of Diplomatic Personnel* (n 11) 46.

⁹⁴ Vattel (n 12) 371.

⁹⁵ Ibid 394.

1.3.4 Reflections on the Theoretical Basis of the Principle of Diplomatic Inviolability

The above three subsections illustrate how the three major theories of diplomatic law provide the theoretical basis for the principle of diplomatic inviolability. Though all three theories were developed and refined during the Classical Periods of the seventeenth and eighteenth century, and as a result, ‘Diplomatic inviolability in all its aspects can be justified under all three theories of diplomatic law’,⁹⁶ it is worth noting that in modern times, their continuing influence on the theory and practice of the principle of diplomatic inviolability varies.

First of all, it is recognised that the theoretical value of the theory of ‘extritoriality’ has been largely downplayed in modern times. As it has been pointed out in the above subsection, the theory of ‘extritoriality’ had its heyday in the sixteenth and seventeenth century and greatly influenced the general recognition of the inviolability of diplomatic premises. However, its weakness had been noted even during the Classical Periods.⁹⁷ The dubious fiction of the theory had become more and more untenable and challenged by scholars,⁹⁸ while at the meantime, the state practice after the eighteenth century had become less and less consistent with the theory except in Far East.⁹⁹ Finally, in the twentieth century, the theory of extritoriality was discarded as a legal basis of diplomatic law¹⁰⁰ which also means it can no longer serve as an independent theoretical

⁹⁶ JC Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Dartmouth 1996) 75.

⁹⁷ Barker, ‘The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods’ (n 73) 608.

⁹⁸ For details, see Ogdon (n 58) 87- 93.

⁹⁹ Roberts (n 7) para 8.9.

¹⁰⁰ See the ‘Introductory Comment of the Harvard Research Draft Convention on Diplomatic Privileges and Immunities’ (1932) 26 AJIL Sup 15, 26. However, it is worth noting that as late as the end of nineteenth century, some private attempts of the codifications of diplomatic law still mentioned

basis of the principle of diplomatic inviolability. Thus, it is not surprising that the Preamble to the VCDR does not mention the theory of ‘extritoriality’ at all.¹⁰¹

The problem with the theory of ‘extritoriality’ lies in the dubious origin of this theory as well as the controversial practice of the theory. With regard to the former point, Barker has argued that ‘[the theory] was never intended to provide a theoretical basis for diplomatic privileges and immunities’.¹⁰² Indeed, it was Grotius that has usually been credited as the ‘architect’ of this theory. However, it is usually neglected by scholars that Grotius himself actually deduced the fiction of ‘extritoriality’ from that of the ‘representative character’.¹⁰³ Moreover, a close examination of the relevant texts from Grotius, Bynkershoek and Vattel reveals that theorists of the Classical Periods mainly used the theory of ‘extritoriality’ in an essentially descriptive manner, and it was the theory of ‘representative character’ that these theorists actually relied on as a legal basis to explain the principle of diplomatic inviolability.¹⁰⁴ With regard to the latter point, the extreme practice of the theory, that is, the so-called ‘*franchise du quartier*’ has never become customary international law. Therefore, as Diena, the Rapporteur of the Committee of Experts for the Progressive Codification of International Law of the League of Nations commented, ‘extritoriality is a fiction which has no foundation either in law or in fact’.¹⁰⁵

extritoriality as the theoretical basis of diplomatic privileges and immunities. These include Bluntschli’s Draft Code 1868 and Fiore’s Draft Code 1890. See ‘Codification of the International Law Relating to Diplomatic Intercourse and Immunities, Memorandum prepared by the Secretariat’ (n 10) 146-147.

¹⁰¹ Denza (n 8) 14.

¹⁰² Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (n 96) 53.

¹⁰³ Grotius used the fiction of ‘extritoriality’ as a further supportive argument that complements the fiction of ‘representative character’ he mentioned earlier. See Grotius (n 56) 443.

¹⁰⁴ Barker, ‘The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods’ (n 73) 602. See also Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (n 96) 53.

¹⁰⁵ ‘Report of the Sub-Committee’ (1926) 20 AJIL Spec Sup 151, 153.

Admittedly, the historical value of ‘extritoriality’ as a theoretical basis of the principle of diplomatic inviolability should not be totally overlooked. Just as Adair pointed out, it would be regrettable if the word ‘extritoriality’ were to be driven from the lexicon of international law’ leading to the ‘complete oblivion of the honorable part it played in the international life of the sixteenth and seventeenth centuries’.¹⁰⁶ Similarly, Barker also argued that ‘there can be little doubt that the development of inviolability as an essential element of diplomatic law owes much to the influence of the extritoriality theory’.¹⁰⁷ It can be justly concluded that the theory of ‘extritoriality’, while it cannot be regarded as an independent theoretical basis of the principle of diplomatic inviolability any more, may still be of great value when examining its evolution.

Secondly, with regard to the theory of ‘representative character’, it is without doubt that unlike the theory of ‘extritoriality’, the theory of ‘representative character’ still has certain significance in modern theory and practice of the principle of diplomatic inviolability. Admittedly, the theory had been less supported during nineteenth century and early twentieth century due to the growing influence of the theory of ‘functional necessity’ as a mainstream theory of diplomatic law.¹⁰⁸ Moreover, its inherent weakness is also obvious, for it cannot provide convincing justification for the inviolability and other privileges and immunities of, for example, minor diplomatic staff and their families.¹⁰⁹ However, with the rise of democratic nations, especially the great increase in number of independent sovereign States after the Second World War, the theory has

¹⁰⁶ Adair (n 78) 264.

¹⁰⁷ Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (n 96) 75. See also Barker, *The Protection of Diplomatic Personnel* (n 11) 52 where he especially argues that ‘it was only as a result of the extritoriality theory that the full extent of [the inviolability of diplomatic premises] was secured in the minds of both the theorists and the local authorities’.

¹⁰⁸ Barker, ‘The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods’ (n 73) 608.

¹⁰⁹ Ogdon (n 58) 135. For other reasons, see Wilson (n 3) 4.

regained its influence for the reason that newly independent States are usually more sensitive of the ‘representative character’ nature of their diplomatic missions and diplomatic agents. Therefore, the theory was not rejected but retained its influence as a theoretical basis of diplomatic inviolability and other diplomatic privileges and immunities. This was actually confirmed in the 1958 Draft Articles on Diplomatic Intercourse and Immunities.¹¹⁰ During the discussion at the Vienna Diplomatic Conference the Soviet delegate Tunkin formally proposed the insertion of the words ‘as representative of States’ into the fourth paragraph of the Preamble, since the theory of ‘representative character’ had been mentioned along with the theory of ‘functional necessity’ in the aforementioned ILC’s Commentary on the 1958 Draft Articles.¹¹¹ His proposal was adopted. In the final text of the VCDR, the Preamble expressly mentions that ‘the purpose of such privileges and immunities is ... to ensure the efficient performance of the functions of diplomatic missions *as representing States*’.¹¹² Moreover, the provisions of inviolability of diplomatic premises and personal inviolability of diplomatic agents all include reference to the idea of ‘their dignity’ – an obvious reminder of the theory of ‘representative character’.

Finally, with regard to the theory of ‘functional necessity’, it is undoubtedly true that modern practice definitively accepts this theory as the primary, if not sole, theoretical basis of diplomatic law. The theory of ‘functional necessity’ gained more and more support from scholars of international law since Vattel’s time and it finally became the primary theoretical basis of diplomatic law in the late nineteenth century and early

¹¹⁰ The Commentary provided that ‘[t]he Commission ... also bearing in mind the representative character of the head of the mission and of the mission itself.’ See ‘Commentary on the 1958 Draft Articles’ (n 65) 95.

¹¹¹ *United Nations Conference on Diplomatic Intercourse and Immunities: Official Records* (United Nations 1962) vol I, 229. See also K Bruns, *A Cornerstone of Modern Diplomacy: Britain and the Negotiation of the 1961 Vienna Convention on Diplomatic Relations* (Bloomsbury 2014) 133-134.

¹¹² See the fourth paragraph of the Preamble to the VCDR, emphasis added.

twentieth century.¹¹³ The reason behind such change can be briefly summarised as follows: First of all, among the three major theories of diplomatic law, only the theory of ‘functional necessity’ can fully explain the rationale of diplomatic privileges and immunities, and this is especially the case with regard to diplomatic inviolability, as discussed in the above subsection. Secondly, State practice since the late nineteenth century had turned to restrict excessive diplomatic privileges and immunities.¹¹⁴ These States were unwilling to concede too much on the issue of diplomatic privileges and immunities, and so, the theory of ‘functional necessity’ was suitable to be used as a solution to the excessive immunities, especially the immunities of those junior staff and family members. Last but not least, with the rise of more democratic States in the late nineteenth century, only the theory of ‘functional necessity’ was not affected by this political change. The other two theories suffered from this change; the theory of ‘functional necessity’ was reinforced by it. For democratic States, ‘functional necessity’ is simply the best justification allowing them to support the regime of diplomatic privileges and immunities, and this was confirmed in the League of Nations’ work on the codification of diplomatic law as well as other region or private codifications of diplomatic law.¹¹⁵

More importantly, the VCDR expressly reflects the theory of ‘function necessity’ as the most correct theoretical basis of the principle of diplomatic inviolability. Above all, the Preamble to the Convention expressly mentions that ‘the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the

¹¹³ Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (n 96) 52-53.

¹¹⁴ ‘Codification of the International Law Relating to Diplomatic Intercourse and Immunities, Memorandum prepared by the Secretariat’ (n 10) 160.

¹¹⁵ ‘Introductory Comment of the Harvard Research Draft Convention on Diplomatic Privileges and Immunities’ (n 100) 26. See also Preamble to the Havana Convention on Diplomatic Officers 1928.

functions of diplomatic missions'.¹¹⁶ This is most clearly evidenced by the fact that relevant articles provide full diplomatic inviolability to those diplomatic staff charged with important diplomatic functions, whereas service staff and private servants, in contrast to the historical position, may not be entitled to diplomatic inviolability at all.¹¹⁷

¹¹⁶ See the third paragraph of the Preamble to the VCDR.

¹¹⁷ Articles 29 and 37 of the VCDR.

Chapter 2 The Historical Evolution of the Principle of Diplomatic Inviolability

It is widely recognised by the leading authorities that the principle of diplomatic inviolability is ‘certainly the oldest established rule of diplomatic law’.¹ Indeed, this claim is justly supported by abundant archaeological evidences as well as numerous ancient classics in which diplomatic practices of ancient civilizations were faithfully recorded.² That evidence reveals the fact that cases concerning the practice of the principle of diplomatic inviolability can be found among almost all the civilisations throughout the ancient world, though the practices were not always consistent and the justification of the principle was fairly metaphysical.³

Admittedly, the specific rules concerning the principle of diplomatic inviolability were rather vague and primitive at best during ancient times, yet the evolution of the history of diplomacy has proved that the principle of diplomatic inviolability did evolve with the development of diplomacy – from ancient times to present days. Actually, from the beginning of ancient diplomacy in the Near East around 3500 BC⁴ until the

¹ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (3rd edn, OUP 2008) 256; I Roberts (ed), *Satow’s Diplomatic Practice* (6th edn, OUP 2009) para 8.1 and 9.2.

² See LS Frey and ML Frey, *The History of Diplomatic Immunity* (Ohio State University Press 1999) 15-20; DJ Bederman, *International Law in Antiquity* (CUP 2001) Chapter 4; GV McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (Hurst 1989) 18-23.

³ One notable archaeological evidence that reveals the early practice of the principle of diplomatic inviolability can be found in the famous ‘Amarna Letters’ written in cuneiform tablets in the fourteenth century BC. See R Cohen, ‘On Diplomacy in the Ancient Near East: The Amarna Letters’ (1996) 7 *Diplomacy & Statecraft* 245, 257.

⁴ Hamilton and Langhorne, based on the recent translations of cuneiform tablets and archives contained in

Renaissance in the fourteenth and fifteenth centuries, the principle of diplomatic inviolability had undergone slight yet notable changes in accordance with the development of diplomatic history. Nevertheless, the core spirit of the principle remains, with new contents and interpretations added from time to time.⁵ Then, it was during the so-called 'Classical Periods' from the seventeenth to the eighteenth centuries that the formal rules regarding the principle of diplomatic inviolability become concrete, with various theoretical explanations supporting the well establishment of such a principle.⁶ From then on, the principle of diplomatic inviolability has gradually become a solid rule in customary international law and, over the last four hundred years, the principle of diplomatic inviolability has been widely recognised by all the States in the international community. Finally, it was in the twentieth century that the principle of diplomatic inviolability was systematically codified and, ultimately, crystallized in the Vienna Convention on Diplomatic Relations 1961.

In order to understand the reason why the principle of diplomatic inviolability is so widely recognised by modern sovereign States and how this vital principle developed from its primitive form in ancient times to the concrete treaty provisions in present days, an examination of the historical evolution of the principle of diplomatic inviolability is both essential and of great significance. Accordingly, this chapter will carry out a brief survey of the historical evolution of the principle of inviolability from ancient times to the present day. In addition to the investigations into the origins of the principle of diplomatic inviolability and its ensuing practice, the gradual development of the theoretical basis of the principle will also be highlighted. Moreover, this chapter will

the 'Letters from Early Mesopotamia' and the 'Amarna Letters', claim that the earliest diplomatic practice actually began in the ancient Near East as early as around mid-third millennium BC. See K Hamilton and R Langhorne, *The Practice of Diplomacy: Its Evolution, Theory and Administration* (2nd edn, Routledge 2011) 7-8.

⁵ See G Mattingly, *Renaissance Diplomacy* (Jonathan Cape 1955) Chapter IV.

⁶ Roberts (n 1) para 8.1.

reveal the distinct features of the evolution of the principle of diplomatic inviolability during each historical period.

2.1 The Origin of the Principle of Diplomatic Inviolability

In order to explore the entire historical evolution of the principle of diplomatic inviolability, some preliminary questions regarding the origin of the principle may attract immediate concern. For example, when and how did the principle of diplomatic inviolability come into existence? How can the principle of diplomatic inviolability become so important that even in ancient times when the law of nations was in its primitive form, the notion of diplomatic inviolability had already been known to almost all civilizations? Without such essential knowledge about the origin of the principle of diplomatic inviolability, it is not easy for anyone fully to understand the gradual evolution of such a vital principle of diplomatic law. Thus, a general discussion on the origin of the principle of diplomatic inviolability is necessary before the detailed exploration into the historical evolution of the principle.

Admittedly, as of today, there is still no conclusive explanation to the origin of the principle of diplomatic inviolability. However, some speculations do provide reasonable explanations, among which are the speculations of ‘State hospitality’, ‘religious sanctity’ and ‘necessity for diplomatic contacts’.

2.1.1 The speculation of ‘State hospitality’

One of the speculations on the origin of the principle of diplomatic inviolability is that the principle derived from the custom of ‘hospitality’ and then became institutionalised by the States as a diplomatic principle. According to this speculation, the custom of private hospitality -- that is ‘one family or household extending hospitality to a traveller from abroad’⁷ so as to alleviate the possible danger faced by the foreign strangers might

⁷ Bederman (n 2) 89.

be considered as a primitive form of the principle of diplomatic inviolability. As a reputable scholar once claimed, '[l]aw begins everywhere with custom'.⁸ Indeed, the custom of hospitality itself was widely practiced during ancient times and its significance is conceivable. For instance, Bederman incisively points out that:

In a world of imperfect and dangerous communications and means of transport, where even modest distances posed incredible obstacles and difficulties for travellers, hospitality was more than a merely desirable institution of personal favour.⁹

It is no doubt that at its very beginning, the practice of 'customary hospitality' involved only private acts of separate households. However, as time went by, the significance of this custom might have been well appreciated by ancient rulers. They might have discovered the practical value of institutionalising such a private custom into a national diplomatic principle, for the reason that they found such positive protection of foreign envoys would not only make diplomatic contact between States more feasible and smooth but also benefit or even ensure the safety of their own envoys in a reciprocal manner. Therefore, it was predictable that the hospitality from local private hosts gradually became the necessary protection of the emissary from foreign countries after it 'became institutionalized and ritualized into patterns of State practice'.¹⁰ Although it may be too speculative to say that such 'necessary protection' of foreign emissaries may infer any positive obligation of the host State to guarantee the safety of foreign envoys in every aspect (for example, to dispatch enough safeguards to secure the safety of the envoy all day around until the emissary leave the territory), it is conceivable that some essential protection such as to prevent danger from marauders as well as the agents of

⁸ J Bryce, *Studies in History and Jurisprudence* (OUP 1901) 640, as cited in *ibid* 49.

⁹ Bederman (n 2) 89.

¹⁰ *Ibid*.

third countries should be ensured.¹¹ Admittedly, such protection only reflects the principle of diplomatic inviolability in its primitive form, however, in theory the speculation that the principle of diplomatic inviolability might derive from the ancient custom of hospitality is not purely unreasonable.¹²

2.1.2 The speculation of ‘religious sanctity’

It is usually claimed that in ancient times, religion played an indispensable role in the development of legal rules.¹³ This was exactly the case with regard to the early development of diplomatic law.¹⁴ Based on this notion, a second speculation which may be termed the speculation of religious sanctity, can be considered as an explanation for the origin of the principle of diplomatic inviolability. According to this speculation, the principle of diplomatic inviolability was rooted in religious beliefs instead of secular concerns. To be specific, this speculation has two assertions which are based on ancient religious beliefs: first, the envoys have divine status which is stipulated according to their religion; secondly, failure to respect the divine status of the envoy will definitely lead to the punishment by the god. In short, it was the divine status of the envoys and the fear of religious sanctions that led ancient States to confer inviolability on foreign envoys.¹⁵

¹¹ Ibid 107.

¹² Notably, some scholars claim that the institution of ‘State hospitality’ is the origin of consular protection. Thus, it might be speculated that even though the protection of envoys and the consular protection of foreigners are two distinct ideas, it might be true that they all derived from the same institution of ‘State hospitality’. See A Kaczirawska, *Public International Law* (4th edn, Routledge 2010) 8. See also LT Lee and J Quigley, *Consular Law and Practice* (3rd edn, OUP 2008) 4.

¹³ For a detailed discussion on the influence of religion on the ancient law, see Bederman (n 2) Chapter 3.

¹⁴ JC Barker, ‘The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods’ 6 *Diplomacy & Statecraft* (1995) 593, 594.

¹⁵ A Gentili, *De Legationibus Libri Tres* (GJ Laing tr, first published 1594, Oceana 1964) 57-58.

As a matter of fact, the divine status of envoys can find some direct references in ancient classics. For example, Sir Harold Nicolson points out that in the famous Homeric poems, ‘heralds were regarded as possessing special sanctity conferred upon them, not by Hermes only, but by Zeus himself’.¹⁶ Considering that ‘[a]ncient religions worshipped national gods’,¹⁷ Bederman argues that ‘[t]he very fact of receiving a foreign nation’s ambassadors was seen as an acceptance of an alien religion and its national gods’.¹⁸ The natural conclusion of this fact is that any harmful acts inflicted on foreign envoys would be deemed as profanation to the god, and undoubtedly, such harmful acts would be punished by god. As Frey and Frey suggest, ‘[h]arming a herald violated divine law, for all power and all authority emanated from the gods. Sanctions would inevitably follow’.¹⁹ Furthermore, the religious sanctity of envoys was sometimes reinforced by formal treaties made between ancient States. For instance, in ancient Greece, there was established a custom that the protection of envoys was usually contained in the relevant treaties or in the agreement of truce between Greek city States.²⁰ Considering that the Greeks, like most ancient civilization at that period regarded their god as the guarantor of their treaties or agreements, it is conceivable that once stated in such treaties and agreements, the inviolability of envoys was guaranteed by their gods. Breaking such agreement would lead to punishment from god.

¹⁶ H Nicolson, *The Evolution of Diplomatic Method* (Constable 1954) 3. Similarly, Professor Bederman refers specifically to the *Iliad* which mentions that the protection of envoys and other kinds of inviolability were secured ‘by the fiction that the envoy was sent not by men, but by the gods’. See Bederman (n 2) 75.

¹⁷ Bederman (n 2) 59.

¹⁸ Ibid 90-91.

¹⁹ Frey and Frey (n 2) 16. It may be arguable that in ancient Greece, it was only heralds who could enjoy inviolability on the basis of their divine status. However, it is notable that in reality, one of the major functions of dispatching heralds was to secure a safe conduct for their envoys. Thus, according to Eileen Young, heralds may be reasonably regarded as ‘the earliest kind of envoy’. See E Young, ‘The Development of the Law of Diplomatic Relations’ (1964) 40 BYIL 141.

²⁰ Frey and Frey (n 2) 18.

2.1.3 The speculation of ‘necessity for diplomatic contacts’

Apart from those two speculations about the origin of the principle of diplomatic inviolability mentioned above, there is a third and perhaps more influential one which may be titled the speculation of ‘necessity for diplomatic contacts’. Indeed, according to many scholars, this speculation seems to be the most plausible explanation as to the origin of the principle of diplomatic inviolability. According to this speculation, the *raison d'être* of the principle of diplomatic inviolability originated from the indispensability of assuring the successful negotiation between two polities, which also suggests that the origin of this principle was inextricable with the origin of ancient diplomacy itself.

Nicolson is one of the proponents of this speculation. In one of his acclaimed works he emphasises the significant influence of the principle of diplomatic inviolability on the origins of primitive diplomacy when he describes what he believes as the very first diplomatic activities between anthropoid apes:

It must soon have been realised that no negotiation could reach a satisfactory conclusion if the emissaries of either party were murdered on arrival. Thus the first principle to become firmly established was that of diplomatic immunity.²¹

Although here Nicolson uses the term ‘diplomatic immunity’, in the context of this quote, what Nicolson actually meant was diplomatic inviolability. He argues that the successful negotiation between two tribes rested on the principle of diplomatic inviolability. According to Nicolson, such principle is significant because it is the basis of negotiation. Without such inviolability, even the personal safety of the emissaries would have been in question, even before the ensuing negotiation. He thus infers that the principle of diplomatic inviolability is the ‘first’ principle ‘to be firmly established’

²¹ Nicolson (n 16) 2.

and it forms the basis of any diplomatic relations.²² Commenting on Nicolson's speculation, Barker argues that 'while [his] speculations cannot be proven, they are certainly not unreasonable'.²³ In fact, Nicolson's speculation does find several archaeological, anthropological and documentary evidences which make it become not purely speculation. According to the excellent summary by Numelin, the rules of personal inviolability of messengers and envoys were well recognised among primitive societies such as the aborigines in South Australia, as well as many other primitive tribes in Oceania, India and Africa.²⁴

In addition to Nicolson, many other scholars support the idea that the principle of diplomatic inviolability is indispensable to the birth of ancient diplomacy. For instance, Professor Bederman points out that '[t]he international law of diplomats and diplomatic protection was fundamental, because without it the simplest forms of negotiation...would be *impossible*'.²⁵ Although Bederman does not expressly mention what are the specific rules of the so-called 'international law of diplomats', in the pages that follow his assertion, it is obvious that what he is referring to are the rules of diplomatic inviolability.²⁶ Similarly, Frey and Frey provide another incisive comment as follows:

²² Ibid.

²³ JC Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Dartmouth 1996) 15.

²⁴ R Numelin, *The Beginnings of Diplomacy: A Sociological Study of Intertribal and International Relations* (OUP 1950) 147-150.

²⁵ Bederman (n 2) 88. Emphasis added.

²⁶ Ibid 106-120.

Necessity forced most cultures to accord envoys basic protections, for only then was intercourse between people possible. Without such protections, no international system...could exist.²⁷

More recently, the International Court of Justice declared in the *Tehran Hostages Case* that:

There is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies.²⁸

Indeed, the assertion of the ICJ in the *Tehran Hostages Case* is evidence that supports the ‘necessity for diplomatic contacts’ speculation as the most plausible explanation to the origin of the principle of diplomatic inviolability, not only because the ICJ’s status as an interpretative institution of international law, but also due to the very fact that the above assertion of the ICJ reflects the essence of diplomacy, that is the ultimate necessity of making mutual contact between States on the basis of reciprocity. Furthermore, compared with the other two speculations, the ‘necessity for diplomatic contacts’ is much more practical, and it reflects the reality of how diplomacy actually began. Therefore, it is suggested that the speculation of ‘necessity of diplomacy’ may be justly regarded as the most plausible explanation of the origin of the principle of diplomatic inviolability.

That being said, it must be borne in mind that all these three speculations serve as probable explanations to the origin of the principle of diplomatic inviolability. Indeed, theoretically the ‘necessity for diplomatic contacts’ may be viewed as the forebear of the modern theory of ‘functional necessity’ which has been expressly stipulated in the VCDR as one of the justification for granting diplomatic privileges and immunities. Likewise, the possible link between the speculation of ‘religious sanctity’ and the later

²⁷ Frey and Frey (n 2) 3. One more statement can be found in Hamilton and Langhorne (n 4) 7.

²⁸ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgement) [1980] ICJ Rep 3, para 38.

developed theory of ‘representative character’ should not be overlooked, either. Moreover, even the less plausible speculation of ‘State hospitality’ may explain the duty of positive protection to some extent. To sum up, all three speculations provide reasonable explanations for the origin of the principle of diplomatic inviolability and reflect realities of ancient civilisations to some extent. Thus, their theoretical value should not be underestimated.

2.2 The Evolution of the Principle of Diplomatic Inviolability

It has already been pointed out at the beginning of this chapter that the principle of diplomatic inviolability is well recognised as one of the oldest rules of diplomatic law. A possible corollary of this assertion is: since diplomatic law itself has quite a long history and, if the speculation of ‘ultimate necessity for diplomacy’ is justified, (ie, ‘the principle of diplomatic inviolability derived from the necessity for making diplomatic contact between ancient States’), then it can be concluded that the evolution of the principle of diplomatic inviolability might actually begin with the birth of ancient diplomacy itself. Accordingly, it can also be suggested that the evolution of the principle of diplomatic inviolability probably kept pace with the evolution of diplomacy, for the reason that ‘through the ages diplomatic motivations and methods have, at least apparently, changed’.²⁹ Indeed, as Frey and Frey point out, ‘[t]he rules and conventions governing diplomatic immunity have thus been historically shaped and conditioned and continue to evolve’.³⁰ Hence, in order to investigate how the principle of diplomatic inviolability evolved with the development of diplomacy, this section will focus on the evolution of the practice of the principle of diplomatic inviolability during four distinct periods in the course of the development of diplomacy, namely ancient times, the Middle Ages, the Renaissance and Classical Periods and modern times. These four

²⁹ GEDNE Silva, *Diplomacy in International Law* (Sijthoff 1972) 13.

³⁰ Frey and Frey (n 2) 4.

periods cover almost the entirety of diplomatic history, and so the practice of the principle of diplomatic inviolability of each of these periods can be systematically reviewed.

2.2.1 Ancient times

It is often said that the earliest records of systematic diplomatic practice are those of Ancient Greece.³¹ However, it is worth noting first that some rudimentary diplomatic activities among some civilizations in the Near East happened long before the heyday of Ancient Greece,³² and some of these ‘rudimentary’ diplomatic activities revealed that an early form of the principle of diplomatic inviolability had already been practiced among some of these ancient civilizations. It can be seen from several documentary records that some civilizations in the Near East expressly recognised the inviolability of envoys based on religious reasons.³³ Failure of observance of this principle would lead to various sanctions, ranging from the punishment of those condemned individuals, to the waging of war against the nation which defied that principle.³⁴ For example, it is depicted in the *Old Testament* that when King David was informed that his ambassadors were seriously insulted by the King of Ammon, he got infuriated and a war was immediately declared by the Israelis.³⁵ This anecdote reveals that attacking an envoy’s dignity was considered as a violation of the principle of diplomatic inviolability, and

³¹ Barker, *The Abuse of Diplomatic Privileges and Immunities* (n 23). See also Nicolson (n 16) 3.

³² See n 4. For a detailed discussion on the diplomatic activities mentioned in the ‘Amarna Letters’, see R Cohen and R Westbrook (eds), *Amarna Diplomacy, the Beginnings of International Relations* (Johns Hopkins University Press 2000). See also McClanahan’s brief summary of ‘rudimentary diplomatic activities’ happened before the heyday of ancient Greece in McClanahan (n 2) 19-21.

³³ Frey and Frey (n 2) 19.

³⁴ Bederman (n 2) 108.

³⁵ TA Walker, *A History of the Law of Nations* (first published CUP 1899, Adamant Media Corporation 2006) 34. For details of this incident, see *Holy Bible* (New International Version, Hodder & Stoughton 2008) 2 Samuel 10:4-7 at 317.

such blatant violation was definitely intolerable. Another example which vividly depicts the sanction that resulted from the defiance of the principle of diplomatic inviolability can be found in the *Amarna Letters*: when a caravan of a Babylonian emissary was accidentally assaulted by the Egyptians, the Babylonian made a vigorous protest to the Pharaoh and asked the Egyptians to investigate the incident as well as to punish the perpetrators. In addition, they also asked the Egyptian to make compensation to them, or the diplomatic relations between them would be severed.³⁶

Although these early practices of the principle of diplomatic inviolability among Middle and Near East civilizations are worthy of appreciation, it is obvious that such practices were by no means consistent or systematic. For instance, in ancient Babylon, although the inviolability of envoys was generally respected and an envoy usually enjoyed ‘swift, unhindered passage’ and necessary protection from marauders, there was no compulsory rule regarding a third State granting inviolability for the envoys transiting their territories.³⁷ Besides, it is revealed that the principle of diplomatic inviolability was in no sense insurmountable by domestic laws or customs. In fact, in ancient Babylon, an envoy might be punished physically and detained if he or she was found liable for a criminal offence, even though ‘strong customary rules barred a host State’s actual injury or prolonged detention of an envoy’.³⁸ More shockingly, in ancient Egypt, envoys were overtly considered as a kind of hostage and might be killed on some occasions.³⁹

³⁶ WL Moran, *The Amarna Letters* (Harvard University Press 1992) 283, as summarised in Cohen (n 3) 257.

³⁷ Bederman (n 2) 107. See also D Elgavish, ‘Did Diplomatic Immunity Exist in Ancient Near East?’ (2000) 2 *Journal of the History of International Law* 73, 90.

³⁸ Bederman (n 2) 108-109. See also Frey and Frey (n 2) 19-20.

³⁹ Bederman (n 2) 108. However, some scholars are sceptical about this ‘legend’. See R Westbrook, ‘International Law in the Amarna Age’ in Cohen and Westbrook (n 32) 34.

Compared with the rudimentary practice of the principle of diplomatic inviolability in ancient Near East, evidently the practice in Ancient Greece and later in Ancient Rome was much more systematic and elaborate. Indeed, it was from the rise of Ancient Greece that an era of systematic diplomacy began.⁴⁰ Diplomatic activities between the Greek city-States were quite frequent during its classical age (750-350 BC)⁴¹, especially after the middle of the sixth century BC.⁴² The Greeks, like those early civilizations in the Near East, practised the principle of diplomatic inviolability mainly based on religious reasons.⁴³ As a result, the differential treatment between heralds (who occupy religious status) and normal envoys (eg, political envoys such as orators) is a distinctive characteristic of the practice of the principle of diplomatic inviolability in Ancient Greece. According to the practice of the Ancient Greeks, heralds were *always* inviolable due to their divine status, whereas normal envoys only enjoyed ‘fundamental personal integrity’, which means they could be arrested or detained for political reasons.⁴⁴ It is therefore unsurprising that an envoy would usually need a herald to make arrangements in advance so as to secure their inviolable status, especially when the emissary was dispatched to a city where the situation was uncertain or possible danger could be foreseen.⁴⁵ With regard to the status of an envoy transiting through a third State, it was

⁴⁰ Hamilton and Langhorne (n 4) 14. See also E Young (n 19).

⁴¹ McClanahan (n 2) 21.

⁴² F Adcock and DJ Mosley, *Diplomacy in Ancient Greece* (Thames and Hudson 1975) 13-14.

⁴³ However, it is said that by the fourth century BC, the theoretical basis for the principle of diplomatic inviolability became more secular, for the principle of reciprocity among States became more and more prevalent. Note Sir Adcock and Mosley argue that ‘[n]o theory of diplomatic immunity prevailed until the emergence of Roman power’. Their assertion is criticised by Professor Bederman who claims that the practice of the principle of diplomatic inviolability in ancient Greece has both religious and secular origins. The later one was even preferable by Greek diplomats by the fourth century BC. See Adcock and Mosley (n 43) 122; Bederman (n 2) 110-111.

⁴⁴ Bederman (n 2) 110 and 112.

⁴⁵ Ibid 111-112. See also Adcock and Mosley (n 42) 154.

quite clear that in Ancient Greece, there was no customary rule demanding a third State to respect the inviolability of envoys passing through its territory, not mentioning envoys from hostile States.⁴⁶ This was quite similar to the practice of the Near East civilizations.

Compared with the theory and practice of the Ancient Greeks, perhaps a more elaborate system of practising the principle of diplomatic inviolability can be seen from the diplomatic activity of the Ancient Romans. As Frey and Frey suggest, the Roman's practice of the principle of diplomatic inviolability was a twofold mechanism, 'dictated by political necessity and reinforced by religious sanction'.⁴⁷ Religiously, the sacred status of the fetials⁴⁸ confirmed the supposed divine origin of envoys. In addition, the fetial law was based upon the oaths of fetials that were made to gods such as Jupiter and Janus.⁴⁹ As Barker points out, these oaths were crucial to the practice of the inviolability of envoys since at that time, the god Jupiter was not only the god of the Romans but also worshiped by many other tribes. It was this kind of 'shared belief system' that actually enhanced the adherence of the principle of diplomatic inviolability among Romans and other tribes or city-States.⁵⁰ This was also one of the reasons that the Roman, unlike the Greeks, treated all other as equal once these races 'were incorporated into the empire'.⁵¹ Secularly, the Romans considered that envoys were the

⁴⁶ Bederman (n 2) 113. See also Adcock and Mosley (n 43) 154.

⁴⁷ Frey and Frey (n 2) 38-39.

⁴⁸ The college of fetials was a 'semipolitical priestly board of twenty men drawn from the noblest families, served both the gods and the state and visibly linked politics and religion'. They can be considered as the earliest ambassadors of ancient Rome. Ibid 39.

⁴⁹ Ibid.

⁵⁰ JC Barker, *The Protection of Diplomatic Personnel* (Ashgate 2006) 30.

⁵¹ Frey and Frey (n 2) 64; see also Bederman (n 2) 114.

‘personification of the sending nation’,⁵² a more noteworthy theoretical progress than the Greeks. Any attack on either the personal safety or the dignity of an ambassador would also be regarded as a violation of the *ius gentium*. Therefore, as Frey and Frey cited from Polybius, ‘an attempt to instigate an attack on the Roman envoys “most flagrantly” violated “the laws of gods and man”’,⁵³ and ‘even an insult to an envoy could mean war’.⁵⁴ Finally, those who violated the principle of diplomatic inviolability were subjected to extradition and punishment.⁵⁵

Despite the abovementioned elaborate mechanism of practising the principle of diplomatic inviolability, it is undeniable that the practice of ancient Romans still had its limitations. First, like most of the ancient civilisations, the Romans did not grant inviolability to envoys who came from an enemy States.⁵⁶ In fact, the Romans ‘did not show...mercy to the envoys of belligerent powers encountered during their travels’, though they were ‘remarkably scrupulous’ about the treating of enemy envoys.⁵⁷ Secondly, although the ancient Romans did make progress with regard to the practice of the principle of diplomatic inviolability, such advances were quite limited. The theoretical basis for the principle of diplomatic inviolability still mainly rested on the two pillars of religion and secularism developed by the Greeks, although, like their Greek predecessors, it was the religious aspect that occupied a more influential place than secular considerations such as reciprocity. Thirdly, even though the Romans initially regarded other States as equal, and ‘in such an environment, Rome could not

⁵² Bederman (n 2) 114.

⁵³ Frey and Frey (n 2) 44.

⁵⁴ Ibid 53. For detailed examples, see ibid 53-57.

⁵⁵ Bederman (n 2) 114-115.

⁵⁶ For instance, see ibid 118-119.

⁵⁷ Ibid.

but realize the importance of safeguarding diplomatic interchange⁵⁸ and continued to adhere the fetial law which stipulated the inviolability of diplomats, when it finally expanded into a hegemonic empire, the soil for developing a more elaborate system for the practice of the principle of diplomatic inviolability was inevitably missing. Consequently, as Barker comments, ‘the further development of Roman law in this area was rather limited’.⁵⁹

Finally, apart from the above mentioned ancient civilizations, two oriental civilizations are also worth mentioning. In Ancient India and China the practice of the principle of diplomatic inviolability can also be traced back at least as far as antiquity. It was recorded in Chinese classics such as *Ch’un Ch’iu*⁶⁰ and *Tso Chuan*⁶¹ that during the Ch’un Ch’iu period (770 BC-476 BC), there existed customary rules recognising the personal inviolability of envoys, as well as the principle of safe passage of envoys.⁶² In addition, the murder of envoys was regarded as ‘a grave affront’.⁶³ Unfortunately, just like the expansion of the Roman Empire, when Ancient China was unified by the Ch’in Empire in the third century BC, the conditions for active diplomatic intercourse between small equal sovereignties was undermined and eventually destroyed, which resulted in the termination of the practice of the principle of diplomatic inviolability.⁶⁴

⁵⁸ Frey and Frey (n 2) 62.

⁵⁹ Barker, *The Protection of Diplomatic Personnel* (n 50) 31. See also Young (n 19) 143.

⁶⁰ Also known as *The Spring and Autumn Annals*.

⁶¹ Also known as *The Commentary of Zuo*.

⁶² RS Britton, ‘Chinese Interstate Intercourse before 700 BC’ (1935) 29 AJIL 616, 625.

⁶³ Ibid. Notably, a distinct characteristic of the practice of the principle of diplomatic inviolability in Ancient China is that the Chinese civilization was far less influenced by religion than any other ancient civilizations of its contemporary time. In fact, it was the Confucius concept of *li* that provided theoretical and practical basis for recognising the inviolability of envoys. See Frey and Frey (n 2) 21-22.

⁶⁴ Frey and Frey (n 2) 22.

In Ancient India, the inviolability of envoys was generally recognised in many classics such as the *Mahabharata*, *Ramayana* and *Arthasatra*, to list a few.⁶⁵ For example, it was stated in the *Arthasatra* that ‘even the lowest born [envoys] are immune from killing’.⁶⁶ However, it is also worth-noting that in ancient India, the actual scope of the principle of diplomatic inviolability was limited to the immunity of envoys from being killed, just like in some other ancient civilizations. Beyond killing, it was suggested in some of these Indian classics, that envoys could be ‘branded, maimed, disfigured, or detained’.⁶⁷ Such facts undoubtedly reveal that the practice of the principle of diplomatic inviolability in ancient India was rather rudimentary compared with that of ancient Greece and ancient Rome.

To sum up, it can be revealed from the above description that the principle of diplomatic inviolability was widely recognised and practised among not only western civilizations but also other ancient civilisations. Although the basis for granting diplomatic inviolability, the degree of the respective practice of the principle, and the scope of the principle, varied from civilization to civilization, it can still be concluded that some essential common rules of the principle of diplomatic inviolability were widely respected by ancient civilizations. These included the necessary protection and personal safety of foreign envoys, the respect of the dignity of foreign envoys and the possible sanctions concerning the punishment of violations of the principle of diplomatic inviolability.

Despite the fact that the principle of diplomatic inviolability was generally respected by ancient civilizations, it is also undeniable that its practice during ancient times was by

⁶⁵ Ibid 20.

⁶⁶ Ibid. However, it was also suggested in the abovementioned Indian classics that envoys could be punished.

⁶⁷ Ibid.

no means perfect. Such imperfection is arguably the most conspicuous feature of the practice of the principle of diplomatic inviolability during ancient times. It can be seen from the following three aspects:

First and foremost, it is conspicuous that the theory regarding the basis for practising the principle of diplomatic inviolability was quite rudimentary during ancient times. As it is revealed above, almost all the ancient civilizations (except Ancient China) respected the principle of diplomatic inviolability based on religious beliefs. Undoubtedly, some rules such as the sanctions for violations of the principle of diplomatic inviolability might not have been developed without substantial religious considerations. However, as Barker points out, to overstate the importance of the role of religion is not right.⁶⁸ Furthermore, as Ogdon explains, the actual forces for granting diplomatic inviolability were ‘necessity’ and the ‘mutual advantage’ (ie, reciprocity),⁶⁹ therefore religious beliefs was only ‘utilised as a form of guarantee’ of the practice of the principle of diplomatic inviolability.⁷⁰ Unfortunately, even the Ancient Greeks and Romans failed to realise the significance of necessity and reciprocity fully. Moreover, accepting religious beliefs as the sole basis for granting inviolability of envoys definitely hampered the further theoretical development regarding the basis of the principle of diplomatic inviolability. As a matter of fact, it was not until the ‘Classical Periods’ of the sixteenth and seventeenth century that a breakthrough regarding the theoretical basis of the principle of diplomatic inviolability occurred.

Secondly, it is evident that the scope of principle of diplomatic inviolability was rather limited during ancient times. In some civilizations, the scope of the principle only covered the basic protection and safety of envoys. Most importantly, among almost all

⁶⁸ Barker, *The Abuse of Diplomatic Privileges and Immunities* (n 23) 34.

⁶⁹ M Ogdon, *Bases of Diplomatic Immunity* (John Byrne & Company 1936) 10-11, 18-19 and 30.

⁷⁰ Barker, *The Abuse of Diplomatic Privileges and Immunities* (n 23) 34.

of the ancient civilizations, envoys that came from an enemy State were regarded as enjoying no inviolability at all. This was also the case of those envoys transiting through the territory of a third State.⁷¹ Furthermore, it seems that there were no concrete legal rules governing the inviolability of the (temporary) residence and property of envoys that can be inferred from the practice of the principle of diplomatic inviolability during ancient times.

Finally, it is also obvious that the practice of the principle of diplomatic inviolability was by no means consistently applied during ancient times. This was a common characteristic of every ancient civilization. For example, among most of the Near East civilizations, domestic laws or political considerations might override the principle of diplomatic inviolability, regardless of the relevant customary rules of the inviolability of foreign envoys. Even in Ancient Greece and ancient Rome, the possibility of disrespect of the principle of diplomatic inviolability was never denied, especially during the high tide of intensive wars.⁷²

2.2.2 The Middle Ages

From the fall of the Roman Empire in 476 AD until the rise of the resident diplomatic missions during the Renaissance in the mid-fifteenth century, the principle of diplomatic inviolability never ceased to evolve, even though the extent of such evolution was relatively slow compared with the one thousand year time span. During the Middle Ages, the evolution of the principle of diplomatic inviolability can be seen mainly through the practices of the Byzantines, the Papacy and in the Islamic world.

When the old Roman Empire came to an end, it was the Byzantine Empire that substantially inherited the systematic diplomatic methods of their ancient western

⁷¹ A clear exception is the Ancient Rome. It is said that the Romans endeavoured to let envoys sent to Rome be protected even by third States. See Frey and Frey (n 2) 59. See also Bederman (n 2) 118.

⁷² Bederman (n 2) 119.

counterparts. The Byzantines normally regarded themselves as the successors of the ancient Romans, so it was quite natural that they inherited many recognised diplomatic principles from ancient Rome. Evidently, the principle of diplomatic inviolability was among one of the principles and practices that the Byzantines inherited directly from their Roman ancestors. To the Byzantines, the sanctity of envoys was emphasized just as the ancient Romans had done. Apparently, the Byzantines still made use of religious sanctity for their bases of granting inviolability of envoys. The Byzantines inherited the theory of the ancient Romans that the sanctity of envoys came from their sacred status, and so, any violation of the personal inviolability of envoys ‘would constitute “an indelible infamy”’, and such violation would be regarded as ‘sacrilegious’.⁷³ As a result, the practice of the principle of diplomatic inviolability by the Byzantines reveals that not only the personal safety but also the dignity of a foreign envoy was generally respected in spite of the fact that their traditional view regarded foreign envoys as spies.⁷⁴

While the Byzantines endeavoured to develop their diplomatic activities in the eastern part of the old Roman Empire, it was the papacy that controlled the relatively infrequent diplomatic activities of the western world.⁷⁵ During the Middle Ages, the Roman Catholic Church actually dominated the diplomatic practice in the western part of Europe. The papacy, like the Byzantines, inherited certain diplomatic principles from the ancient Romans, among which the most notable example was the principle of diplomatic inviolability. To be specific, the principle of diplomatic inviolability mainly concerned the sacrosanctity of the papal legate—the personal representative of the

⁷³ Frey and Frey (n 2) 85.

⁷⁴ Ibid 77.

⁷⁵ Barker, *The Protection of Diplomatic Personnel* (n 50) 32. See also Hamilton and Langhorne (n 4) 31-35.

Pope.⁷⁶ Actually, though the principle of inviolability evolved from the old Roman traditions, the practice of the inviolability of papal legates was also buttressed by several new factors. In the first place, the inviolability of papal legates derived from their sacred status linked directly to the Pope. Since the Pope frequently dispatched papal legates as his personal representatives, the papal legate was regarded as the “eye of the church”, the ‘arm of the pope’.”⁷⁷ As a matter of fact, during the Middle Ages the Pope himself was regarded as having ultimate authority governing all matters of human society and should be highly respected; therefore it was not surprising that logically his personal representatives should naturally enjoyed certain kind of sacred status.⁷⁸ Secondly, just as the principle of diplomatic inviolability had been absorbed in the *ius gentium* during the heyday of the Roman Empire, during the Middle Ages the principle of diplomatic inviolability was evidently stipulated in the canon law of the time.⁷⁹ Furthermore, the cost of defying the inviolability of envoys was high enough to deter those who would dare to challenge the principle of diplomatic inviolability. Notably, this applied not only to the inviolability of papal legates but also to those secular envoys that were sent to or sent by the Pope. Any kind of violation of the inviolability of papal legates or those who sent by or sent to the Pope would be subjected to severe penalties by the papacy. According to Frey and Frey, the Pope usually did not tolerate any

⁷⁶ That being said, it was also no doubt that the principle of diplomatic inviolability also covered the inviolability of secular envoys – those envoys sent by various European sovereigns and barbarian tribes. See Young (n 19) 144. See also Frey and Frey (n 2) 81.

⁷⁷ Frey and Frey (n 2) 78.

⁷⁸ This phenomenon, as Barker points out, can be viewed as an ‘early manifestation’ of the ‘representative character’ theory which later developed into one of the three most influential theories regarding the bases for the principle of diplomatic inviolability. See Barker, *The Protection of Diplomatic Personnel* (n 50) 32. However, with regard to secular envoys, this theory was still too inchoate to be applied. It was not until the end of the Middle Ages that the theory of ‘representative character’ became more influential and recognised as a reasonable basis for granting inviolability of secular envoys. See Frey and Frey (n 2) 84-85.

⁷⁹ Frey and Frey (n 2) 81. See also DE Queller, *The Office of Ambassador in the Middle Ages* (Princeton University Press 1967) 175-176.

indecent treatment of his legates. He could rely on diplomatic channels to put pressure on secular rulers; he could make use of his exclusive fiscal tools to levy a tax on ecclesiastical goods; and more seriously, he could use his most powerful weapon of the time – excommunication – to punish those who dare to challenge the inviolability of the papal legates.⁸⁰ In a word, all the above three factors together with the ancient tradition made the inviolability of envoys (especially the inviolability of papal legates) a solid diplomatic principle of the Middle Ages.

Apart from the practice of the Byzantines and the Papacy, the practice of the principle of the Islamic world is also worth noting. Generally speaking, during the Middle Ages the Muslims recognised the inviolability of envoys just like their western counterparts. This can be seen through the following two aspects: first, just like the fact that the principle of diplomatic inviolability was stipulated in the canon law of the western Christians, the inviolability of envoys was similarly stipulated in Islamic laws, which generally provided the legal basis for granting inviolable status on envoys;⁸¹ secondly, with regard to the diplomatic activities between the Islamic world and the western Christians, the principle of diplomatic inviolability still applied,⁸² mainly as an expedient of avoiding reprisal by the ‘infidel’ non-Muslims.⁸³

Overall, the characteristics of the practice of the principle of diplomatic inviolability during the Middle Ages can be summarised as follows:

⁸⁰ Frey and Frey (n 2) 80-81.

⁸¹ For example, the Saracenic law stipulated the sacred status of envoys and forbid the maltreatment or murder of envoys even when ‘hostilities broke out’. See *ibid* 86.

⁸² According to the summary by Frey and Frey, the Christians and the Muslims shared in common in that envoys should enjoyed sanctity, though they all contended that ‘infidels’ enjoyed less protection. See *ibid*. See also Young (n 19) 144.

⁸³ Frey and Frey (n 2) 99-100. See also Queller (n 79) 176-179.

First, with regard to the most significant factor that determines the evolution and practice of the principle of diplomatic inviolability, it is clear that during the Middle Ages, the dominant justification for inviolability was gradually transferred from religious beliefs to the principle of reciprocity. As it has been discussed in the previous section, during ancient times, the basis for the principle of diplomatic inviolability was dominated by religious beliefs. All major civilizations (except Ancient China) made full use of religious beliefs as their ground for granting inviolability of envoys. Besides, almost all punishments for violating the principle of diplomatic inviolability were also recourse to religious sanctions. Admittedly, even during the Middle Ages, religion still played an important role with regard to the theory and practice of the principle of diplomatic inviolability. However, as Barker points out:

While religion suffices as an explanation for the inviolability of ambassadors within certain groups of people sharing a common religious background, it does not fully explain the inviolability between such groups.⁸⁴

Indeed, insofar as the recognition and respect of the inviolability of envoys between different or even opposing religious groups, the truth was that the principle of diplomatic inviolability still generally applied. Obviously, the influence of religious beliefs could no longer justify such a phenomenon. Instead, a more reasonable explanation of the recognition and observance of the principle of diplomatic inviolability between different religious groups could well be explained by the effects of the principle of reciprocity – on one hand, respecting and protecting envoys sent and received from other civilizations would probably guarantee the inviolability of their own envoys; on the other hand, it was also predictable that defying the principle of diplomatic inviolability would lead to reprisal from other civilizations. Indeed, the principle of reciprocity became more and more significant when the diplomatic contact between the eastern world and the western world became more and more frequent,

⁸⁴ Barker, *The Abuse of Diplomatic Privileges and Immunities* (n 23) 34.

especially during the later stage of the Middle Ages. Thus, Frey and Frey incisively concluded that during the Middle Ages, ‘the fear of reprisal served as the best safeguard for envoys’.⁸⁵

Secondly, compared with the inconsistent practice of the principle of diplomatic inviolability during the ancient times, the recognition and observance of the principle of diplomatic inviolability was considerably more enhanced during the Middle Ages. This can be justified by the fact that more influential factors contributed to the practice of the principle of diplomatic inviolability. First, the increasing number of law codes undoubtedly provided more guarantee on the observance of the principle of diplomatic inviolability. Indeed, as has been pointed out above, both the western Christians and the eastern Muslims compiled law codes that stipulated the principle of diplomatic inviolability.⁸⁶ According to Frey and Frey, these law codes were ‘rigidly precise not only in dictating the envoy’s prescribed words and actions but also in determining the exact punishment meted out to those who harmed him’.⁸⁷ In addition to law codes, many medieval customs also buttressed the observance of the principle of diplomatic inviolability, especially the custom of granting protection and respect for envoys of special status.⁸⁸ Furthermore, at least as far as secular envoys were concerned, it can be asserted that law codes and custom played a more influential role in the practice of the principle of diplomatic inviolability than religious considerations. Last but not least, as has been pointed out in the previous paragraph, the principle of reciprocity made both the western Christians and Muslims strive to respect the principle of diplomatic

⁸⁵ Frey and Frey (n 2) 99. Indeed, the principle of reciprocity will destined to become one of the core principles of modern diplomatic law several hundred years later.

⁸⁶ The western Christian stipulated the principle of diplomatic inviolability in their canon laws while the Muslims also emphasized this principle in their Islamic laws.

⁸⁷ Frey and Frey (n 2) 91.

⁸⁸ Ibid 90.

inviolability when making diplomatic contacts with each other. In a word, it was the combined effects of these factors that made the practice of the principle of diplomatic inviolability more consistent and stable than during ancient times. Therefore, it is not surprising that during the Middle Ages, all civilizations, no matter whether western Christian or eastern Islamic world or the Byzantines, respected the principle of diplomatic inviolability much better than their ancestors during ancient times.⁸⁹

Finally, it is not prejudiced to assert that the scope of the principle of diplomatic inviolability was still quite limited during the Middle Ages. This characteristic can be seen from two aspects. Theoretically, during the Middle Ages there was no systemic theory on the basis of the principle of diplomatic inviolability. Although religion, law codes, customs and the principle of reciprocity all provided valuable sources for the practice of the principle of diplomatic inviolability, these factors never formed a grand theory which was able fully to justify the principle of diplomatic inviolability. Instead, most of these factors were more or less only considered as expedients by medieval theorists.⁹⁰ Practically, due to the lack of resident missions, the theme of the principle of diplomatic inviolability still mainly focused on the inviolability of envoys. Although both the personal property and the temporary residence of an envoy were generally protected by the host States during the Middle Ages, this was more or less a courtesy rather than a legal institution.⁹¹ In summary, it can be concluded that no systematic theory of the principle of diplomatic inviolability emerged during the Middle Ages, and the scope of the principle of diplomatic inviolability was confined to the inviolability of

⁸⁹ Ibid 108.

⁹⁰ For instance, the Papacy made use of religion to ensure the inviolable status of papal legates; secular principals used customs to guarantee the safety of their envoys; different religious world had no choice but to observe the principle of diplomatic inviolability owing to the effects of the reciprocity. Some interesting examples can be seen in Frey and Frey (n 2) 85-90. See also Queller (n 79) 181.

⁹¹ A few medieval theorists did discuss the issue of the inviolability of the residence and property of an envoy, such as Gratian and Alfonso X. See Queller (n 79) 176, 181.

envoys. As the history of diplomatic law reveals later, the more elaborated theories of diplomatic inviolability and the more extensive scope of the principle of diplomatic inviolability did not become the focus of theorists of diplomatic law until after the establishment of permanent diplomatic missions during the Renaissance period in the mid-fifteenth century.⁹²

2.2.3 The Renaissance and Classical Periods

The Renaissance and Classical Periods which dated from the middle of the fifteenth century till the outbreak of French Revolution in 1789 are arguably the most significant era in the development of diplomatic law.⁹³ Beginning with the emergence of resident embassies in Italy,⁹⁴ the development of diplomatic law during these periods witnessed several watershed events. As far as the evolution of the principle of diplomatic inviolability is concerned, these events can be specified as follows: the defying of the rule of inviolability of envoys during the high tide of religious struggles, the newly introduced challenges to the inviolability of ambassadors in the notorious political conspiracies involving ambassadors, the astonishing extension of the inviolability of diplomatic premises and the negative consequences thereof, and most importantly, the establishment of three systematic theories regarding diplomatic privileges and immunities which were crystallised in legal classics written by great theorists of diplomatic law. Ultimately, it is during these periods that both the theory and practice of the principle of diplomatic inviolability achieved unparalleled progress.

⁹² Barker, *The Abuse of Diplomatic Privileges and Immunities* (n 23) 34-35. See also McClanahan (n 2) 25.

⁹³ Barker, 'The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods' (n 14) 593.

⁹⁴ As Mattingly points out, 'Diplomacy in the modern style, permanent diplomacy, was one of the creations of the Italian Renaissance'. See Mattingly (n 5) 55. For a detailed discussion on the birth of the resident embassy, see Hamilton and Langhorne (n 4) chapter 2.

The evolution of the principle of diplomatic inviolability during the Renaissance can be viewed as the continuation of the practice of the Middle Ages, with some notable features introduced. When resident diplomatic missions came into the forestage of diplomacy around the middle of the fifteenth century,⁹⁵ it began to bring about two notable developments on the principle of diplomatic inviolability. First and foremost, with regard to the scope of the principle, the inviolability of embassy premises and diplomatic property were added to the contents of the old principle. Not only the personal inviolability of ambassadors and envoys but also the inviolability of their property, along with the inviolability of embassies and diplomatic correspondence were now covered by the principle of diplomatic inviolability.⁹⁶ As a result, when resident embassy became a widely accepted institution, it began to bring about several new issues related to the practice of the principle of diplomatic inviolability though specific issues such as the inviolability of ambassadors who were involved in conspiracies against the sovereign to whom they were accredited were not emerged as conspicuous theoretical and practical dilemmas during the Renaissance.⁹⁷ Secondly, the notable increase in diplomatic contacts after the establishment of resident embassies also ensured that the principle of diplomatic inviolability became the focus of the legal theorists of the day. This was a natural by-product of the rise of resident embassies, for

⁹⁵ According to Nicolson, '[T]he first resident embassy in the modern sense was that accredited in 1450 to Cosimo dei Medici by the Duke of Milan. See Nicolson (n 16) 33. Though there exists some contentions over the exact starting point of the first resident diplomatic mission, it is less doubtful that 'within the next ten or so years, all the principal states of Italy had established permanent diplomatic relations with another'. See Barker, 'The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods' (n 14) 597.

⁹⁶ A Eyffinger, 'Diplomacy' in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 820-821.

⁹⁷ Young concludes that 'much of the more complex controversy' did not emerge until the sixteenth century. See Young (n 19) 145.

the reason that more and more sovereign States had to rely on legal authorities to tackle practical issues related to the inviolability of resident envoys and their property.⁹⁸

In addition to the aforementioned two developments during the Renaissance, two disappointing drawbacks were also worth noting. First, perhaps under the influence of Machiavelli,⁹⁹ incidents of violations of the principle of diplomatic inviolability such as the arrest of ambassadors and seizure of diplomatic documents were not uncommon during the Renaissance,¹⁰⁰ though '[i]nviolability in time of peace must obviously have been generally observed'.¹⁰¹ Secondly, as far as the third States were concerned, the customary law still followed the practice of the ancient times and the Middle Ages, that is, the inviolability of envoys was only recognised by the States to which the envoy was accredited. Envoys were subjected to interception by third States during their journey to the destination States. Numerous incidents of intercepting and arresting envoys en route during the Renaissance proved that no advance was achieved with regard to this specific issue.¹⁰²

To sum up, the Renaissance period can be better regarded as a period of transition rather than an era of great leap in the evolution of the principle of diplomatic inviolability. Although it marked the beginning of resident diplomatic missions and contributed some

⁹⁸ For example, legal theorists in the Renaissance era such as Brunus, Martin of Lodi and Francisco de Vitoria had discussed the inviolability of ambassador in their works so as to offer advices to their governments faced with the issues brought about with the advent of resident embassies. See Frey and Frey (n 2) 149-150. It is also worth noting that during the same time, the legal issue regarding the immunity from jurisdiction of diplomats also became a significant theme of diplomatic law. Due to the theme of this thesis, in this Chapter only issues related to the principle of diplomatic inviolability will be discussed.

⁹⁹ Nicolson (n 16) 32.

¹⁰⁰ For instance, see the de Praet Incident in Young (n 19) 143.

¹⁰¹ Young (n 19) 145. See also Mattingly (n 5) 45-46.

¹⁰² For details of these incidents, see Frey and Frey (n 2) 133.

new features to the evolution of the principle of diplomatic inviolability, it was obvious that revolutionary changes to the substantial rules of the principle of diplomatic inviolability had yet to be seen.

Following the Renaissance, it was the Classical Periods, from the end of the sixteenth century to the end of the eighteenth century, which marked the actual revolutionary progresses in the evolution of the principle of diplomatic inviolability. First and foremost, these two hundred years witnessed the emergence of a batch of great theorists of diplomatic law who contributed enormously to the evolution of diplomatic law and, of course, the principle of diplomatic inviolability. These great theorists included Gentili, Ayrault, Hotman, Grotius, Zouche, Wicquefort, Bynkershoek, and Vattel. They produced a plethora of ‘landmark’ treatises on diplomatic law¹⁰³ (or chapters on diplomatic law in their general works on the law of nations)¹⁰⁴ which had significant impacts on the evolution of the diplomatic law of the day, both theoretically and practically. Theoretically, these treatises greatly stimulated the formation and recognition of the theories of diplomatic law.¹⁰⁵ These three theories had their seeds planted in ancient times, yet they were indeed recent contributions made by the aforementioned theorists of the Classical Periods. Notably, it should be emphasized that with regard to the principle of diplomatic inviolability, the theoretical basis for granting inviolability of embassies and ambassadors were well discussed in most of these treatises. Practically, it is submitted that many controversial issues, such as the inviolability of embassy premises, the inviolability of an ambassador who is involved in

¹⁰³ For instance, Gentili’s *De Legationibus Libri Tres* (n 15) and Bynkershoek’s *De Foro Legatorum* (first published 1721).

¹⁰⁴ For instance, the chapter titled ‘Of the Rights of Embassies’ in Book II of Grotius’s *De Jure Belli ac Pacis* (first published 1625) and chapters related to the right of embassies in Book IV of Vattel’s *The Law of Nations* (first published 1758).

¹⁰⁵ These three theories are: the theory of representative character, the theory of extraterritoriality and the theory of functional necessity. For details, see Chapter 1, section 1.3.

criminal offences, and the inviolability of diplomatic correspondence, were all systematically analysed and discussed in works of Gentili, Grotius, Wicquefort, Bynkershoek and Vattel.¹⁰⁶ Their analysis and discussions greatly influenced State practice on the principle of diplomatic inviolability, which ultimately contributed to the consolidation of many specific rules of the principle of diplomatic inviolability by the end of the Classical Periods.

In addition to the emergence of great theories and great works of diplomatic law, the contents of the principle of diplomatic inviolability were also substantially expanded, either as a result of the invocation of great theorists or the actual practice of States. Following the emergence of the theory of extraterritoriality, it was during the sixteenth century that the so-called '*franchise du quartier*'¹⁰⁷ were incorporated to the content of the principle of diplomatic inviolability. In a few Western European capitals such as Venice, Rome, and Madrid, this notorious privilege 'prevented the law enforcement officers of the receiving State from taking action in, or even entering the district surrounding, the embassy premises and entitled the ambassador to exemption from duty on supplies brought in nominally for his use'¹⁰⁸ Similarly, the '*droit de chapelle*'¹⁰⁹ had become a solid rule of the principle of diplomatic inviolability, after extensive State practice in the seventeenth century. Moreover, it is worth noting that more and more States began to recognise that the inviolability of ambassadors remained in effect during

¹⁰⁶ It needs to be noted that the issue of inviolability and the immunity from criminal jurisdiction are closely related. Scholars such as Wicquefort and Bynkershoek discussed these two issues together. Again, it has to submit that in this chapter, only issues related to the principle of diplomatic inviolability will be discussed.

¹⁰⁷ Frey and Frey (n 2) 223-226; Barker, 'The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods' (n 14) 604; Young (n 19) 156-157.

¹⁰⁸ Young (n 19) 156.

¹⁰⁹ Frey and Frey (n 2) 177-180.

wartime,¹¹⁰ and it was during this time that the inviolability of members of the families of diplomats was also gradually accepted as a customary rule.¹¹¹

Last but not least, it is worth noting that it was during the Classical Periods that the principle of diplomatic inviolability became gradually to be legislated in the municipal laws of many sovereign States, which in turn influenced the State practice of the principle of diplomatic inviolability of these States.¹¹² As a matter of fact, with the gradually increase of newly introduced controversial issues regarding the principle of diplomatic inviolability, such as the inviolability of ambassadors involving criminal offences (especially political crimes such as conspiracies against the receiving sovereigns or the criminal act of espionage),¹¹³ the inviolability of the property of the diplomatic mission, the inviolability of diplomatic correspondence, the necessity to legislate the principle of diplomatic inviolability under domestic law became obvious and urgent. Thus, beginning with the Netherlands decree of 1651,¹¹⁴ many European States started making municipal laws to stipulate the principle of diplomatic inviolability.¹¹⁵ This progress can be viewed as a watershed event in the evolution of the principle of diplomatic inviolability, for the reason that the stipulation of the principle of diplomatic inviolability in the municipal law of States not only codified their

¹¹⁰ Ibid 243.

¹¹¹ Denza (n 1) 391.

¹¹² Cf, the canon law and Islamic law during the Middle Ages. See Section 2.2.2 above.

¹¹³ The two most infamous incidents are the *Mendoza Case* and the *Leslie Case*, summarised and analysed in Frey and Frey (n 2) 167-176.

¹¹⁴ According to Bynkershoek's description, the Netherlands decree passed on 29 March 1651 stipulated that ambassadors should be duly protected and those who had injured ambassador and their suite or residence or anything else of theirs should be punished. See C van Bynkershoek, *De Foro Legatorum* (GJ Liang tr, first published 1721, Oceana Publications 1964) 10.

¹¹⁵ For instance, the 1679 decree of the States-General of the Netherlands, the Danish ordinance of 1708 and the British Diplomatic Privileges Act 1708. See Young (n 19) 158.

respective State practice with regard to the principle of diplomatic inviolability but also influenced the further practice of the principle of diplomatic inviolability.¹¹⁶

Notably, it is submitted that the above-mentioned revolutionary progression did not occur accidentally. Indeed, after the evolution in the transitional period of the Renaissance in the middle and late fifteenth century, diplomatic law in the Classical Periods had prepared for accepting great changes. In short, the great progress in diplomatic law can be regarded as the fruit of the combined effect of the following factors: in the first place, it was the enormous increase in both the frequency and intensity of diplomatic activities among sovereign States that stimulated the great progress in diplomatic law. As a matter of fact, most of the radical issues regarding the inviolability of diplomatic premises (eg, the issue of diplomatic asylum) did not exist until the emergence of resident embassies during the Renaissance, and, the actual emergence of other controversial issues regarding the principle of diplomatic inviolability (eg, the inviolability of ambassadors who involved in conspiracy against the sovereign of the receiving States) did not occur until there was ‘an enormous expansion in the amount of diplomatic intercourse and a change in many of its methods and characteristics’.¹¹⁷ It can be asserted that it was only after the wide-spread establishment of permanent diplomatic mission that the principle of diplomatic inviolability became the focus of many theorists of international law.

In the second place, the change of theme of diplomacy in the Classical Periods also contributed to the great progress. It is submitted that the theme of diplomacy in the seventeenth century had changed from the dealing with the conflicts of religion to dealing with the conflicts between European sovereign States. Even though religion still influenced the theoretical basis of the principle of diplomatic inviolability during the

¹¹⁶ Ibid 159.

¹¹⁷ Ibid 146.

Renaissance and early Classical Periods, it is quite obvious that after the Peace of Westphalia in 1648, European sovereign States became firmly aware of the importance of reciprocity, and religious factors could no longer rightly explain the principle of diplomatic inviolability. The necessity of introducing a new theoretical basis for the principle of diplomatic inviolability led to the boom of great treatises on diplomatic law, which resulted in the establishment of the aforementioned three significant theories of diplomatic law.¹¹⁸

Finally, in order to keep pace with developments in the theory of diplomatic law, as well as adapting to the new diplomatic methods, certain additions to the scope and content of the principle of diplomatic inviolability were not only necessary but also vital to the practice of diplomatic relations among sovereign States. Thus, it was not surprising to witness the gradual emphasis on the protection of foreign diplomats and diplomatic premises, as well as diplomatic correspondence and other properties during the Classical Periods.¹¹⁹

Overall, it is not exaggerating to state that the evolution of the principle of diplomatic inviolability achieved great progress during the Renaissance and Classical Periods. As has been discussed above, these three and half centuries witnessed not only the landmark progress in the theoretical aspects of the principle of diplomatic inviolability but also the practical aspects: great treatises on the issue of diplomatic inviolability had been produced; modern theories of the principle of diplomatic inviolability had been

¹¹⁸ It is recognised that Ayrault was the first writer to purpose the theory of extraterritoriality, while Vattel was the first writer that 'placed greatest emphasis' on the theory of functional necessity. See Barker (n 15) 601 and 605.

¹¹⁹ See E de Vattel, *The Law of Nations or the Principles of Natural Law* (CG Fenwick tr, first published 1758, Oceana Publications 1964) 371-372. Indeed, it was Vattel that first suggested the special duty of protection existed. His emphasis on the protection of diplomats produced profound influence on the state practice on the principle of diplomatic inviolability. For instance, see a series of US domestic cases involving the punishment against individuals who violated the inviolability of foreign diplomats shortly after the US passed its Punishment of Crimes Act 1790. See Barker, *The Protection of Diplomatic Personnel* (n 50) 46- 47.

introduced; the scope and contents of the principle of diplomatic inviolability had been expanded, and finally, municipal laws stipulating the principle of diplomatic inviolability had been gradually legislated. It is recognised that after the great progress in the Renaissance and Classical Periods, by the end of the eighteenth century, many specific rules of the principle of diplomatic inviolability had been consolidated as customary international law, and the principle of diplomatic inviolability was firmly established as one of the most recognised principles in the category of the law of nations.¹²⁰ Indeed, the significance and profound influence of the evolution of the principle of diplomatic inviolability during the Renaissance and Classical Periods should not be overlooked. As Barker concludes:

[I]t is clear that the emergence of diplomatic privileges and immunities into the settled regime apparent in modern diplomatic would not have been possible without the developments which took place during the [R]enaissance and Classical Periods.¹²¹

2.2.4 From the nineteenth century to the present day

Compared with the revolutionary progresses occurred in the Renaissance and Classical Periods, the evolution of the principle of diplomatic inviolability during the nineteenth century was relatively stable.¹²² That being said, there were still notable developments achieved during this century. In the first place, the shift of prevalence in legal philosophy from the natural law theory to legal positivism had a significant impact upon the theoretical concerns of the principle of diplomatic inviolability. The *raison d'être* of the principle of diplomatic inviolability, along with other diplomatic privileges and immunities, were challenged by academic writers such as those from the Italian or the

¹²⁰ It has been pointed out by Frey and Frey that even the radical French revolutionaries 'found themselves defending...diplomatic inviolability'. See Frey and Frey (n 2) 327.

¹²¹ Barker, 'The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods' (n 14) 610.

¹²² Young (n 19) 169.

Belgian schools.¹²³ Nevertheless, it was probably due to the very influence of Vattel's work in which great emphasis on the theory of functional necessity was placed that ultimately led to the 'triumph of functionalism'¹²⁴ in the nineteenth century. As a result, some overextended and extraordinary rights within the category of diplomatic inviolability that had developed during the Classical Periods such as the *franchise du quartier* and *droit de chapelle* became 'archaic' and inevitably lost favour among theorists,¹²⁵ even if they were not completely relinquished in practice.¹²⁶ In the second place, the inviolability of envoys under special situations other than those inside the territory of a receiving State was practically recognised according to the general State practice by the nineteenth century. To be specific, the inviolability of envoys in transit was now generally recognised by third States.¹²⁷ In addition, the inviolability of envoys from belligerent powers passing through neutral States was also granted.¹²⁸ Moreover, the inviolability of envoys during wartime, no matter whether they are inside the war zones or under siege, was also recognised in principle.¹²⁹ In the third place, during the nineteenth century, the evolution of the principle of diplomatic inviolability also witnessed the continuing trend of the late Classical Periods that States endeavoured to

¹²³ Frey and Frey (n 2) 337.

¹²⁴ Ibid 336.

¹²⁵ Young suggests that it was the combine effects of the 'spread of religious tolerance, more effective maintenance of public order and international guarantee of the alien abroad' that led to the abolishment of these kind of extraordinary rights. However, it is obvious that without the strong influence of the legal positivism and functionalism, it would be much difficult for theorists to provide convincing challenges to these rights. See Young (n 19) 146 and Frey and Frey (n 2) 345-347.

¹²⁶ Ironically, during the same period, European and American colonial powers forced the so-called 'semibarbarous' and 'barbarous' world (mostly those civilisations in Asia and Africa) to accept their privileges of extraterritoriality, such as the 'franchise du quartier'. See Frey and Frey (n 2) 414-415. See also Hamilton and Langhorne (n 4) 116.

¹²⁷ Frey and Frey (n 2) 350.

¹²⁸ Ibid 353.

¹²⁹ Ibid 352.

incorporate specific rules of the principle of diplomatic inviolability into their municipal legal system. As Frey and Frey point out: ‘by the nineteenth century governments and courts often formally recognized the basic inviolability of the envoy and that of the embassy premises by incorporating what had been recognized as custom and usage into municipal law’.¹³⁰ Finally, perhaps most significantly, it was during the second half of the nineteenth century that some attempts to codify a universal law regarding diplomatic privileges and immunities began to take place. These codifications include Bluntschli’s Draft Code (1868), Fiore’s Draft Code (1890) and the Resolution of the Institute of International Law, Cambridge (1895).¹³¹ Notably, all of these codifications contained substantial parts dealing with the principle of diplomatic inviolability, which made valuable contributions to the consolidation of the principle of diplomatic inviolability.¹³²

Following the relatively stable evolution during the nineteenth century, the evolution of the principle of diplomatic inviolability during the twentieth century witnessed the most drastic changes ever since the Renaissance and Classical Periods. Indeed, the radical change of diplomatic methods,¹³³ the shattering of the old diplomatic system due to the two catastrophic world wars¹³⁴ during the first half of the twentieth century and the rise of new international diplomacy as a result of decolonization and the Cold War during the second half of the twentieth century brought about unprecedented impacts on the

¹³⁰ Ibid 348.

¹³¹ See Appendix 1 to 3 of the Harvard Draft Convention on Diplomatic Privileges and Immunities (1932) 26 AJIL Sup 18, 144-164.

¹³² For instance, paragraph 461 of Fiore’s Draft Code stipulates the personal inviolability of a diplomatic agent while paragraph 463 regulates the inviolability of diplomatic correspondence. Likewise, Section I (Article 1 to 6) of the Resolution of the Institute of International Law specifically deal with the principle of ‘inviolability’. In contrast, even though the Vienna Regulation of 1815 and the 1818 Protocol of Aix-la-Chapelle were generally regarded as the most significant documents of the nineteenth century diplomatic law, there were no provisions regarding diplomatic inviolability in these two documents.

¹³³ Nicolson (n 16) Chapter IV.

¹³⁴ Frey and Frey (n 2) 425-426.

theory and practice of the principle of diplomatic inviolability, which can be well illustrated through both triumphs and challenges that brought to the principle of diplomatic inviolability.

The triumphs of the evolution of the principle of diplomatic inviolability during the twentieth century can be seen from two aspects: First, the old principle of diplomatic inviolability successfully came through the ordeals of many upheavals of international relations during the twentieth century. There is no doubt that the heinous violations of the principle of diplomatic inviolability in various periods of the twentieth century, especially during the Second World War and the high tide of the Cold War, brought unprecedented impact to the existence of the principle of diplomatic inviolability.¹³⁵ However, Frey and Frey's authoritative account of the history of diplomatic immunity during the twentieth century disclosed that even though there had been violations of the principle of diplomatic inviolability during such upheavals, generally the principle was still be widely recognised and respected not only by western European powers but also by Communist countries, as well as by all of the newly independent States during the post-war era.¹³⁶ This very fact reaffirms that the principle of diplomatic inviolability is the 'fundamental prerequisite' of diplomatic relations, as pointed out by the ICJ in the *Tehran Hostages Case*.¹³⁷

The second aspect of the triumph of the evolution of the principle of diplomatic inviolability during the twentieth century is that, after painstaking efforts,¹³⁸ the

¹³⁵ Barker, *The Protection of Diplomatic Personnel* (n 50) 60-61. See also Frey and Frey (n 2) 433-435.

¹³⁶ Frey and Frey (n 2) 426-432. Notably, the Soviet's strong support for the principle of diplomatic inviolability can be expressly seen through the records of statements and comments of its delegation at the 1961 Vienna Conference. See G Tunkin, 'Vienna Convention on Diplomatic Relations' (1961) 6 *International Affairs* 51. See also EL Kerley, 'Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities' (1962) 56 *AJIL* 88.

¹³⁷ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgement) [1980] ICJ Rep 3, para 38..

¹³⁸ These efforts included Pessoa's Draft Code (1911), the Project of the American Institute of

principle of diplomatic inviolability was ultimately codified into a system of truly ‘universal diplomatic law’ during the second half of the twentieth century¹³⁹ -- the principle of diplomatic inviolability is highly evident throughout the provisions of the Vienna Convention on Diplomatic Relations 1961, the Vienna Convention on Consular Relations 1963,¹⁴⁰ the Convention on Special Missions 1969¹⁴¹ and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973.¹⁴² There is no doubt that the codification of the principle of diplomatic inviolability in these Conventions¹⁴³ marks a great triumph, for the reason that these Conventions ultimately crystallize the extant principle of diplomatic inviolability from its fluctuant evolution over several thousand years since its origin in antiquity. Indeed, these Conventions themselves can be regarded as the very

International Law (1925), Phillimore’s Draft Code (1926), Strupp’s Draft Code (1926), Draft Code of the International Law of Japan (1926), the Project of the International Commission of American Jurists (1927), the Resolution of the Institute of International Law, New York (1929) and the Harvard Draft Convention on Diplomatic Privileges and Immunities (1932). Like those attempted codifications of the late nineteenth century, all of these draft codes stipulated the principle of diplomatic inviolability (mostly focused on the personal inviolability of diplomats). In addition to these draft codes, the Convention on Diplomatic Officers, adopted at Havana in 1928, which can be regarded as a successful regional codification of diplomatic law, specifically stipulated the inviolability of diplomatic officers along with the inviolability of their residences and properties (Article 14). The full text of all the above mentioned codifications can be seen in the Appendix 4 to 11 of the Harvard Draft Convention on Diplomatic Privileges and Immunities (1932) 26 AJIL Sup 18, 164-187. Notably, of all the codifications mentioned above, the provisions concerning the principle of diplomatic inviolability in the 1932 Harvard Draft Convention have the most significant importance. For a detail account, see E Denza, ‘Diplomatic Privileges and Immunities’ in JP Grant and JC Barker (eds), *Harvard Research in International Law, Contemporary Analysis and Appraisal* (William S Hein & Co 2007) 155-177, see especially the analysis on the duty of protection of the mission premises and the inviolability of mission archives, page 163-166.

¹³⁹ Indeed, though attempts to codify a universal law of diplomatic privileges and immunities never stopped during the first half of the twentieth century, it was only during the second half of the twentieth century that the ‘fruit of codification of a universal diplomatic law’ became ripen. For reasons of this assertion, see Young (n 19) 180-181.

¹⁴⁰ 596 UNTS 261 (adopted 24 April 1963, entered into force 19 March 1967).

¹⁴¹ 1400 UNTS 231 (adopted 8 December 1969, entered into force 21 June 1985).

¹⁴² 1035 UNTS 167 (adopted 14 December 1973, entered into force 2 February 1977).

¹⁴³ The specific stipulations of the principle of diplomatic inviolability under the VCDR will be discussed in detail in the next chapter.

evidence that the principle of diplomatic inviolability survived the huge turmoil during its thousands of years of evolution.

Along with the above-mentioned two triumphs, it is recognisable that the twentieth century also witnessed two new challenges that critically influenced the evolution of the principle of diplomatic inviolability: in the first place, the growing influence of the international human rights movement since the end of the Second World War has brought about debates on issues concerning the application of the principle of diplomatic inviolability, which include, but are not limited to: the problem of balancing the freedom of expression and the protection of the dignity and safety of mission premises/diplomatic agents;¹⁴⁴ the dilemma of overriding the inviolability of diplomatic agents so as to stop ongoing public danger (eg, firing a pistol on the street, drunk-driving, etc);¹⁴⁵ the validity of entering mission premises to save someone from torture (or saving human's life under public emergency), without initial consent from the head of mission; the validity of invoking the principle of diplomatic inviolability to grant asylum in mission premises under urgent situations of saving human life (eg, immediately after a failed *coup d'etat*),¹⁴⁶ to list but a few. These issues reveal several conflicts between the principle of diplomatic inviolability and other norms of international law,¹⁴⁷ which can be viewed as one of the examples of the phenomenon of 'fragmentation of international law'.¹⁴⁸

¹⁴⁴ Denza (n 1) 169-175, 263-264.

¹⁴⁵ Ibid 266-268.

¹⁴⁶ See AJ Jeffery, 'Diplomatic Asylum: Its Problems and Potential as a Means of Protecting Human Rights' (1985) 1 South African Journal on Human Rights 10. See also G Noll, 'Seeking Asylum at Embassies: A Right to Entry in International Law?' (2005) 17 International Journal of Refugee Law 542.

¹⁴⁷ See DB Asher, 'Human Rights Meet Diplomatic Immunities: Problems and Possible Solutions' [2000] Harvard Law School Academic Year 2000-2001 Paper No.2.

¹⁴⁸ See 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' in A Pronto and M Wood

In addition to the challenge from human rights issues, there is also the challenge from the ‘traditional’ consideration of national sovereignty. Indeed, the abuse of diplomatic inviolability, especially the abuse of the inviolability of diplomatic premises by the diplomats of the sending States as a convenient tool to endanger the national security of the receiving States, was not uncommon during the period of Cold War. Consequently, the never fading debate over the issue of inviolability of the mission premises and the right of self-defence revived during the second half of the twentieth century.¹⁴⁹ Moreover, the conflicts between sovereign issues and the principle of diplomatic inviolability have become even more complicated with the rapid development in science and technology during the last several years of the twentieth century.¹⁵⁰ Such conflicts have seriously challenged the traditional State practice of the principle of diplomatic inviolability.¹⁵¹

The conflicts between the principle of diplomatic inviolability and other norms of international law and the theoretical controversies arising from the conflicts will be thoroughly analysed in Chapters 5 and 6 of the thesis.

(eds), *The International Law Commission 1999-2009* (OUP 2010) vol IV, 614. See also J Pauwelyn, ‘Fragmentation of International Law’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol IV, 219

¹⁴⁹ A common example of this kind of issue is, on one hand, a receiving State may argue that, based on the doctrine of self-defence, under certain circumstance the necessity of protecting its national security overweighs the inviolability of mission premises or mission archives/correspondence, while on the other hand, a sending State may rebuke that the doctrine of self-defence is only a pretext referred by the receiving State to ‘invading’ its mission premises or intercept its diplomatic correspondence.

¹⁵⁰ For instance, the wide spread use of email and electronic scanning device bring about new concerns about the inviolability of diplomatic correspondence.

¹⁵¹ See R Higgins, ‘The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience’ (1985) 79 AJIL 641; J Brown, ‘Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations’ (1988) 37 ICLQ 53; FA Mann, “Inviolability” and other Problems of the Vienna Convention on Diplomatic Relations’ in FA Mann, *Further Studies in International Law* (OUP 1990) 326; SE Nahlik, ‘Development of Diplomatic Law, Selected Problems’, (1990) 222 *Recueil Des Cours* 187; MK Nawaz, ‘Is A Diplomatic Bag Open to Electronic Examination?’ (1994) 34 *Indian Journal of International Law* 57.

Chapter 3 The Contemporary Legal Regime of the Principle of Diplomatic Inviolability

As was pointed out in Chapter 1, the material scope of the legal regime concerning the principle of diplomatic inviolability in contemporary diplomatic law covers three major categories: diplomatic premises, diplomatic personnel and diplomatic property.¹ Most of the core rules of the principle of diplomatic inviolability have been codified in the VCDR. Meanwhile, it is worth mentioning that customary international law still plays an important role in the delimitation of specific rules of the principle of diplomatic inviolability. This chapter will focus on the relevant provisions in the VCDR as well as the rules of customary international law in order to provide a detailed survey of the contemporary legal regime of the principle of diplomatic inviolability. Particular attention will be paid to identifying controversies arising from the conflicts between the treaty provisions of the VCDR and other important norms of contemporary international law.

3.1 The Principle of Diplomatic Inviolability as Applied to Diplomatic Premises

Generally speaking, diplomatic premises play a dual role in modern diplomatic practice. In the first place, diplomatic premises serve as the ordinary and major working places for the diplomatic mission. This is their primary function. Meanwhile, they also represent the sovereignty of the sending State and the dignity of its occupiers.² As such,

¹ See Chapter 1, Section 1.2.2.

² In the Commentary of the International Law Commission's Draft Articles 1958, there is one paragraph which says '[t]he inviolability of the mission premises is not the consequence of the inviolability of the head of the mission, but is an attribute of the sending State by reason of the fact that the premises are used as the headquarters of the mission'. This important paragraph reveals the relationship between significant role of the mission premises and its inviolability. See 'Draft Articles on Diplomatic Intercourse and Immunities', YILC [1958] vol II, 95. Hereafter referred as 'Commentary on the ILC's Draft Articles'.

it may be suggested that the inviolability of diplomatic premises can be regarded as the most significant category of the application of the principle of diplomatic inviolability.³ Indeed, as has been pointed out in Chapter 2, ever since the rise of resident embassies during the Renaissance period, the significance of the inviolability of diplomatic premises was quickly recognised by scholars as well as in State practice,⁴ and ultimately, by the eighteenth century, it is unarguable that the inviolability of diplomatic premises was generally accepted as a rule of customary international law.⁵ Nowadays, the core rules concerning the inviolability of diplomatic premises are codified in the VCDR, which covers three kinds of premises: the mission premises which are defined so as to include the private residence of the head of the mission, the private residence of diplomatic agents other than the head of the mission, and the residence of minor staff and diplomatic couriers.⁶ With regard to the former two categories, the extent of inviolability is absolute and unqualified under the VCDR, whereas in relation to the third category only limited inviolability is recognised.

3.1.1 The Inviolability of Mission Premises

Article 22 of the VCDR expressly stipulates the inviolability of mission premises:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

³ J d'Aspremont, 'Premises of Diplomatic Missions' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol,VIII, 412, para 1.

⁴ See Chapter 2, section 2.2.3.

⁵ I Roberts (ed), *Satow's Diplomatic Practice* (6th edn, OUP 2009) para 8.9.

⁶ Strictly speaking, only the mission premises and private residence of diplomatic agents can be deemed as 'diplomatic premises'. For the discussion in the current chapter, the author intends to extend the coverage of this term to residence of minor staff and diplomatic courier, to emphasize the limited inviolability of these premises.

3. The premises of the mission, their furnishings and other property thereon and means of transport of the mission shall be immune from search, requisition, attachment or execution.

The above stipulation obviously reflects the two distinct aspects of the concept of inviolability: Articles 22.1 and 22.3 generally cover the first aspect of inviolability, that is, the immunity from any kind of interference or enforcement from the authorities of the receiving State. Meanwhile, Article 22.2 covers the second aspect of inviolability, that is, the status of being positively protected by the authorities of the receiving State. The three paragraphs of Article 22 of the VCDR constitute the normative legal regime of inviolability of mission premises in contemporary international law.⁷

It should be noted that the stipulation of the inviolability of mission premises in Article 22, although it expressly mentioning the two distinct aspects of diplomatic inviolability, nevertheless lacks detailed guidance for tackling with specific situations and certain thorny issues arising from the practical application of this article. It is also unclear under Article 22 and other provisions of the VCDR when the inviolability of mission premises begins and ends. Therefore, several important theoretical and practical points involving the inviolability of mission premises will be further elaborated in the following sections.

a) The meaning of ‘mission premises’

The very first point that needs to be clarified is what constitutes ‘mission premises’. This point is vital to the whole issue because it concerns the practical question as to precisely what kind of premises should be granted inviolable status. According to Article 1 (i) of the VCDR, ‘mission premises’ or ‘the premises of the mission’ refers to ‘the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission’. This definition makes it clear that not only the main buildings of the mission, but also the surrounding land, such as embassy gardens and car parks, are

⁷ Article 22.3, which is termed as the freedom from ‘jurisdiction’, will be discussed in Section 3.3.1.

deemed as ‘mission premises’.⁸ As a result, these areas enjoy the same degree of inviolability as mission buildings. As to what buildings can be deemed as ‘used for the purposes of the mission’, it may be questioned whether premises that are generally opened to the public ought to be treated as mission premises.⁹ With regard to this issue, Denza suggests that Article 3 of the VCDR, which stipulates the functions of a diplomatic mission, may be invoked for the determination of such borderline cases.¹⁰ However, it may be argued that even for tourist offices, they might be considered as important for the carrying out the function of ‘promoting friendly relations between the sending State and the receiving State’ as specified in Article 3.1 (e) of the VCDR. Therefore, it is suggested that in most cases, the sending State and the receiving State shall reach agreement on the status of certain premises so as to avoid further practical difficulties when dealing with the inviolability of mission premises.¹¹ It is also worth noting that for certain premises, their status is subject to withdrawal by the receiving State once the receiving State no longer wishes to treat them as mission premises. This may happen when relevant terms of favourable treatment are cancelled due to administrative measures to control the abuse of the inviolable status of certain premises,¹² or simply due to a kind of diplomatic retaliation.¹³

⁸ Commentary on the ILC’s Draft Articles (n 2) 95.

⁹ Typical premises of such kind include cultural institutes, tourist offices, embassy reading rooms, of information offices. See Roberts (n 5) para 8.19.

¹⁰ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (3rd edn, OUP 2008) 22.

¹¹ This may suggest that even an embassy reading room or a tourist office will be deemed as inviolable as long as the receiving State does not challenge its status as part of the mission premises.

¹² See Denza (n 10) 22 for the UK practice on this issue. See also Article 1(5) of the UK Diplomatic and Consular Premise Act 1987 (c 46).

¹³ It is worth noting that unless diplomatic relations are severed, there must be certain core premises (usually the embassy) which served as the major site to carry out diplomatic functions (no matter what specific name these premises hold).

b) The negative duty of the receiving State and the extent of the inviolability of mission premises under Article 22.1

The second point that needs to be elaborated is the extent to which the inviolability of mission premises under Article 22.1 applies. As has been pointed out above, Article 22.1 imposes a negative duty on the receiving State. This duty is one of the most complicated issues arising from the inviolability of mission premises and needs to be divided into two aspects for further elaboration. First of all, according to the text of Article 22.1, without the express consent of the head of the mission, ‘agents’ of the receiving State are prohibited from entering the mission premises. ‘Agents’ includes those ‘persons clothed with governmental authority’,¹⁴ namely those enforcement officials such as police and judicial officials. Thus, for example, the police will not be able to chase a criminal into the mission premises without receiving permission from the head of the mission. Forcible entrance in such kinds of situations will inevitably cause protest from the sending State, as numerous cases have illustrated.¹⁵ Similarly, service of legal process on the mission premises by judicial officers will be considered as a contravention of the inviolability of mission premise.¹⁶ It is generally accepted that service of legal process by post is also prohibited.¹⁷ Essentially, ‘the receiving State is obliged to prevent its agents from entering the premises for any official purpose whatsoever’.¹⁸

¹⁴ E Denza, ‘Diplomatic Privileges and Immunities’ in JC Barker and JP Grant (eds), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (Fred B Rothman & Co 2007) 163.

¹⁵ Denza (n 10) 147-148.

¹⁶ This was the opinion reflected in both the 1957 and 1958 Commentary on the International Law Commission’s Draft Article. See Commentary on the ILC’s Draft Article 1958 (n 3) 95 and ‘Draft Articles Concerning Diplomatic Intercourse and Immunities’, YILC [1957] vol II, 137. State practice after the adoption of the Vienna Convention also supports this view. See Denza (n 10) 151.

¹⁷ Denza (n 10) 151.

¹⁸ Commentary on the ILC’s Draft Articles (n 2) 95.

The second aspect involving the extent of the application of inviolability of mission premises concerns whether there is any exception to the unqualified inviolability of mission premises under Article 22.1. State practice following the adoption of the VCDR reveals two possible situations that in which unqualified inviolability may be challenged. The first kind of situation is when there is an on-going emergency endangering human life. A typical example of this kind of situation is that of public emergency such as where a fire breaks out in the mission premises or in a neighbouring property. As has been discussed above, the text of Article 22.1 refers to ‘agents’ that generally includes State officials such as police and judicial officers. Whether such a term also includes non-State officials such as fire-fighters or doctors is less clear and may be subject to debate. It may be suggested that fire-fighters or doctors under the direct order of the government of the receiving State should be treated as ‘agents’ in the sense of Article 22.1. However, it is not always easy to determine such status when such public emergency situation suddenly happens.

Another example, which is less likely to happen but should be noted, is when the mission premises are being used in such an improper way that human life is directly threatened. The notorious incident that occurred on April 17, 1984 outside the Libyan Embassy in London is such a situation.¹⁹ Likewise, if evidence is found that there is on-going torture being carried out inside the mission premise, it might be argued by the receiving State that the necessity of protecting human life can be invoked as a convincing reason for its authorities to overwhelm the unqualified inviolability of mission premises under Article 22.1.²⁰ Nevertheless, it is obvious that the strict application of Article 22.1 of the VCDR requires that even in emergencies such as those highlighted above, no authority of the receiving State is generally allowed to enter into the mission premises without obtaining consent from the head of the mission.

¹⁹ The incident involves the shooting from the window of the Libyan embassy, causing the death of female constable Fletcher. See UK House of Commons Foreign Affairs Committee, ‘The Abuse of Diplomatic Immunities and Privileges’ (1984/85 HC 127), para 74; GV McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (Hurst & Company 1989) 6.

²⁰ Denza (n 10) 150.

The second situation in relation to which the unqualified inviolability of mission premises may be challenged is when activities taking place inside the mission constitute abuse of the inviolability of mission premises, and may be deemed by the receiving State as threatening its national security. According to Article 41.3 of the VCDR, mission premises ‘must not be used in any manner incompatible with the functions of the mission...or by other rules of general international law’. If the mission premises have been used as a base for supporting espionage activity or aiding local anti-government groups, or have become an asylum for hiding anti-government activists, it may be argued that such activities constitute a form of abuse of the inviolability of Article 21.1, which is definitely not compatible with the functions of the mission. However, like the first situation that mentioned above, the strict application of Article 21.1 generally prohibits any contravention of the inviolability of mission premises even when the receiving State deems that its national security will be endangered due to the on-going abuse of the inviolability of mission premises.²¹

To sum up, it is generally accepted that the inviolability of mission premises stipulated under Article 22.1 is unqualified and absolute in nature. The strict application of this article requires no exception to inviolability. As a matter of fact, such strict application has raised great controversies and fierce academic debate since the adoption and entry into force of the VCDR.²² These controversies will be further discussed in detail in Chapter 5 of the thesis.

c) The positive duty of protecting mission premises under Article 22.2

As has been pointed out at the beginning of the current section, the positive duty of protecting mission premises under Article 22.2 reflects the second aspect of diplomatic inviolability. The necessity for such positive protection has already been discussed in

²¹ Ibid.

²² D’Aspremont (n 3) para 14-22, 25; Denza (n 10) 144-147.

Chapter 1.²³ The text of Article 22.2 also seems self-explanatory. It stipulates a dual aspect of protection and actually imposes a dual task for the authorities of the receiving State: in the first place, to prevent the mission premises from any kind of unauthorised physical intrusion; secondly, to prevent the mission from disturbance of its peace and impairment of its dignity. However, there are still two important issues with regard to the practical application of Article 22.2 that need to be further clarified. First, Article 22.2 expressly mentions that the receiving State must take ‘all appropriate steps’ so as to protect the mission premises. The phrase ‘all appropriate steps’ is not expressly defined in the VCDR. However, in the Commentary to the ILC’s Draft Articles 1958 there is a rather vague description that explains the expression in the following terms:

The receiving State must, in order to fulfil this obligation [of protection], take special measures – over and above those it takes to discharge its general duty of ensuring order.²⁴

The above description nevertheless fails to specify the exact meaning of the phrase ‘all appropriate steps’. Practice after the adoption of the VCDR does provide valuable references to the issue. With regard to this particular issue, d’Aspremont holds the opinion that the extent of the protection provided should be ‘proportionate to the degree of threat to each particular mission of which the receiving State is aware’.²⁵ Thus, it can be implied that the application of ‘all appropriate steps’ requires the authorities of the receiving State to make use of their discretion in various circumstances. For example, in face of a mass riot or mob attack, the receiving State shall increase police presence and set a cordon. Another valuable opinion can be found in UK Foreign Affairs Committee’s Report, ‘The Abuse of Diplomatic Immunities and Privileges’. In that report, the Committee points out that:

²³ See Chapter 1, sections 1.1.1, 1.3.1 and 1.3.3.

²⁴ Commentary on the ILC’s Draft Articles (n 2) 95.

²⁵ D’Aspremont (n 3) para 29.

Provided always that work at the mission can continue normally, that there is untrammelled access and egress, and that those within the mission are never in fear that the mission might be damaged or its staff injured, the requirements of Article 22 are met.²⁶

Thus, it can be suggested that the above commentary provides a set of criteria for the authorities of the receiving State to determine what kind of measures are ‘appropriate’ to the positive protection of mission premises. It is also worth noting that when a request for protection is made by the diplomatic mission, such as a call for help from the head of the mission, the receiving State should be taken seriously. It should not run the risk to failing its duty of protection.²⁷ Indeed, it is the duty of the receiving State to make reasonable judgment in each specific case. For instance, when there is a mass demonstration targeted at the mission premises and the diplomatic mission requests for a detachment of police force to protect the premises, such a request should be deemed as reasonable. On the other hand, the receiving State has no obligation under Article 22 to fulfil unreasonable request such as stationing a battalion of policemen when there is nothing outstanding happens (or going to happen) outside the mission premises.

The second issue related to the duty of positive protection under Article 22.2 is how to understand the phrase ‘peace and dignity’. Indeed, neither the phrase ‘peace and dignity’ nor the phrase ‘disturbance or impairment’ have been defined in the VCDR. The Commentary on the ILC’s Draft Articles 1958 also fails to specify any detailed definition for these terms. In practice, the receiving State frequently faces certain thorny situations which can place it in a dilemma. For example, when a politically motivated demonstration takes place outside a diplomatic mission and, for example, the national flag of the sending State is burned, what should the response of the receiving state’s authorities be? For example, should the authorities restrict such activity of the

²⁶ ‘The Abuse of Diplomatic Immunities and Privileges’ (n 19) xvii, para 48. See also CJ Lewis, *State and Diplomatic Immunity* (3rd edn, Lloyd’s of London Press Ltd 1990) 147.

²⁷ For example, permanent protection has been requested by the US and Israel embassy in some countries, and this request is not contested by the receiving State. See d’Aspremont (n 3) para 29.

demonstrators? What is evident is that in most democratic countries, constitutional rights grant citizens the right to demonstrate as a specific form of the freedom of speech and assembly. Meanwhile, various international human rights treaties also stipulate that State parties should endeavour to respect the right of their citizens to peaceful assembly, which includes the right to demonstrate outside a foreign diplomatic mission.²⁸ The issue is, how can the authorities of the receiving State balance the positive protection of the peace and dignity of the diplomatic mission on one hand, and the right of its citizens to demonstrate on the other? Without an exact definition or even some criteria of the term ‘peace and dignity’, the complicated dilemma faced by the authorities of the receiving State cannot be easily solved. It is this kind of dilemma that becomes another controversy arising from the application of the inviolability of mission premises under Article 22.2.

The above two controversies arising from the positive protection of mission premises under Article 22.2 will be further analysed in Chapter 6.

d) The commencement and termination of the inviolability of mission premises

The last point of controversy arising with regard to the inviolability of mission premises concerns the question of when inviolability begins and ends. In contrast to the commencement and termination of the inviolability of diplomatic agents, the commencement and termination of the inviolability of mission premises are not expressly stipulated anywhere in the VCDR. However, this issue is of vital importance for the reason that it regulates when the positive duty of protection under Article 22.2 begins and ends. With regard to the commencement of the inviolability of mission premises, there are three suggested options. The first option suggests that the inviolability of mission premises begins when the sending State has expressly notified the receiving State of its acquisition of certain premises for use by its diplomatic

²⁸ These international human rights treaties include: the Universal Declaration on Human Rights 1948, the International Covenant on Civil and Political Rights 1966, the European Convention on Human Rights 1950, the American Convention on Human Rights 1969, the African Charter on Human and Peoples’ Rights 1986, and the Arab Charter on Human Rights 2004.

mission.²⁹ Accordingly, protection under Article 22.2 should begin once the receiving State has received such notification from the sending State.³⁰ The second option suggests that the inviolability of mission premises should begin when the premises have ‘reached the stage of interior installation and decoration’.³¹ The third option suggests that the inviolability of mission premises should begin when the premises ‘were put at the disposal of the mission’.³² Though the second opinion has been supported by several cases, it may be of less value if a sending State does not use a newly constructed building, but instead acquire an already furnished and decorated one.³³ The first option may be of practical value, and it still remains the first choice of some receiving States.³⁴ However, it should be noted that the actual putting into use of the premises by the mission is a far more decisive factor than the nominal notification. Thus, the third option, which obviously reflects the ‘functional necessity’ theory, may be a much better option. Just as d’Aspremont comments,

It is clear that the requirement of prior notification is being eroded to give way to satisfaction of functional, or close thereto, usage of diplomatic premises in order to trigger inviolability.³⁵

With regard to the termination of the inviolability of mission premises, some similar approaches can be used to determine the end of the inviolable status of mission

²⁹ D’Aspremont (n 3) para 6; Denza (n 10) 176. See also Article 3.1 of the ‘Harvard Research Draft Convention on Diplomatic Privileges and Immunities’, (1932) 26 AJIL Sup 15, 50. Hereafter referred as ‘the Harvard Draft Convention’.

³⁰ Article 3.2 of the Harvard Draft Convention.

³¹ Denza (n 10) 176.

³² Ibid.

³³ For example, to use premises that were occupied and used formerly by another sending State.

³⁴ This is the UK practice. In addition, Sections 1 (1) and 1 (3) of the UK Diplomatic and Consular Premises Act 1987 also specifies that the status of the premises is subjected to the acceptance or consent from the Secretary of State.

³⁵ D’Aspremont (n 3) para 7.

premises. If the sending State expressly notifies the receiving State of its intention of not using certain mission premises anymore, and even specifies a date of such termination, the inviolability of these premises will accordingly cease on that date.³⁶ If the sending State does not provide such notification to the receiving State, then the receiving State should continue to treat the mission premises as inviolable, until it is beyond doubt that the premises are not to be used by the mission.³⁷ One further point is worth noting. According Article 45 (a) of the VCDR, even when diplomatic relations are severed, or if a mission is permanently or temporarily recalled, the receiving State should generally treat the mission premises as inviolable for a ‘reasonable period’.³⁸ This ‘reasonable period’ can be a couple of days or even a couple of months, depending on different circumstances and the national legislation of the receiving State³⁹ It is quite obvious that after such a period, the receiving State no longer has to protect the mission premises.⁴⁰

3.1.2 The Inviolability of Private Residence of Diplomatic Agents

In addition to the premises of a diplomatic mission, another kind of diplomatic premises that is granted inviolable status under the VCDR is the private residence of diplomatic agents. In the first place, it should be noted that Article 1(i) of the VCDR expressly stipulates that the residence of the head of the diplomatic mission is regarded as a part of the mission premises. The inviolability of the private residence of the head of the mission is, accordingly, covered by Article 22 of the VCDR. Thus, the following

³⁶ Roberts (n 5) para 8.19.

³⁷ D’Aspremont (n 3) para 8.

³⁸ Roberts (n 5) para 8.19. As Denza points out, this is a reasonable implication as an analogy from Article 39 of the VCDR (which stipulates such ‘reasonable period’ for the inviolability of a diplomatic agent after his appointment ends). See Denza (n 10) 489-490.

³⁹ For instance, the legislation of Switzerland specifies six months as the time limit for such a period, while the legislation of Venezuela specifies only one month.

⁴⁰ Denza (n 10) 490.

paragraphs will focus on the inviolability of private residence of diplomatic agents other than the head of mission.

According to Article 30.1 of the VCDR,

The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

The term ‘private residence’, as pointed out in the Commentary on the ILC’s Draft Articles 1958, should include even the temporary residence of the diplomatic agent.⁴¹ Thus, it can be suggested that not only the regular (or ‘primary’) residence such as a leased apartment or a house, but also the temporary residence such as a hotel room or a villa during vacation, should be treated as the ‘private residence’ of the diplomatic agents as per Article 30.1. The above stipulation expressly regulates that the extent of the inviolability of the private residence of the diplomatic agent should be the same as that of the mission premises. Thus, the two aspects of inviolability should be applied with regard to relevant residence, that is, the authorities of the receiving State cannot enter the private residence of the diplomatic agent without securing his consent in advance.⁴² Additionally, the authorities of the receiving State should also provide special protection for the private residence of diplomatic agents.

⁴¹ The commentary elaborates, ‘Because this inviolability arises from that attaching to the person of the diplomatic agent, the expression “the private residence of a diplomatic agent” necessarily includes even a temporary residence of the diplomatic agent’. See Commentary on the ILC’s Draft Articles (n 2) 98.

⁴² That being said, it is worth noting that on rare occasions, the private residence of a diplomatic agent had been entered by enforcement authorities without securing consent. On 2 May 2013, the US Immigration and Customs Enforcement officers raided the private residence of a military attaché of the Saudi Arabian Embassy in McLean, Virginia where they rescued two Philippine domestic workers who were suspected to have been the ‘victims of domestic servitude’ and ‘human trafficking’. See ‘Saudi-Owned Home Near CIA Raided for Possible Human Trafficking’ (*CBS DC*, 2 May 2013) < <http://washington.cbslocal.com/2013/05/02/saudi-diplomats-home-raided-for-possible-human-trafficking/> >. See also ‘Federal Authorities Investigate McLean Home after Allegations of Human Trafficking’ (*The Washington Post*, 2 May 2013) < http://www.washingtonpost.com/local/federal-authorities-investigate-mclean-home-after-allegations-of-human-trafficking/2013/05/02/5cd65a36-b372-11e2-bbf2-a6f9e9d79e19_story.html>, both accessed 26 June 2014.

With regard to the commencement and termination of the inviolability of the private residence of the diplomatic agent, the same rules with regard to those of the mission premises may be applied.⁴³ However, it should be noted that if the diplomatic agent has permanently moved out of his or her primary residence, the inviolable status terminates instantly. As Denza points out, the analogy of a ‘reasonable period’ for the extension of the inviolability does not apply to the private residence of the diplomatic agent.⁴⁴ Also, with regard to a temporary residence, its inviolability terminates once the diplomatic agent has left it.

Another issue which is worth noting is whether the inviolability of the primary residence of the diplomatic agent should subsist when he is temporarily absent from it. It may be argued that such inviolability shifts to the temporary residence, and this argument accords with the idea that inviolability should keep up with the relevant individual. Nevertheless, as Denza comments, very often the diplomat’s property remains in his primary residence, and since the property of a diplomatic agent also has inviolable status under Article 30.2,⁴⁵ it is naturally reasonable that even during the temporary absence of the diplomatic agent, his primary residence should remain inviolable.⁴⁶

Last, but not least, it should also be noted that if the diplomatic agent is a national or permanent resident of the receiving State, his private residence may not be inviolable. According to Article 38.1 of the VCDR,

[A] diplomatic agent who is a national of or permanent resident in that State shall enjoy only ... inviolability, in respect of official acts performed in the exercise of his functions.

⁴³ See Section 3.1.1 4) above.

⁴⁴ Denza (n 10) 272.

⁴⁵ See section 3.3.4 below.

⁴⁶ Denza (n 10) 271-272.

It may be argued that the term ‘inviolability’ in Article 38.1 only refers to the personal inviolability of a diplomatic agent. However, it should be noted that if the relevant diplomatic agent is actually engaged in an official task within the receiving State, his permanent and, where applicable, any temporary residence may still be entitled to inviolability. Likewise, if it is believed that certain official documents of the diplomatic mission are present in the primary residence of the diplomatic agent, inviolability should be conferred upon such residence even though the diplomatic agent is a national or a permanent resident of the receiving State.

3.1.3 Other Premises that are Entitled to Inviolability: Residence of the Administrative and Technical Staff; Family Members

Apart from the above two major categories of diplomatic premises, the VCDR also stipulates several other kinds of premises that are entitled to inviolability. These premises include the private residence of the administrative and technical staff, the private residence of the family members of the diplomatic agent and administrative and technical staff, and, arguably, the temporary residence of the diplomatic courier.

The inviolability of the private residence of the administrative and technical staff is stipulated under Article 37.2 which mentions that:

Members of the administrative and technical staff of the mission... if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Article 29 to 35.

Since the inviolability of the private residence of a diplomatic agent is prescribed under Article 30.1, it can be concluded that the text of Article 37.2 suggests a similar kind of inviolability for the private residence of an administrative or technical staff member. It is worth noting that if these members are nationals or permanent residents of the receiving State, their private residence may not be inviolable, unless such inviolability is expressly admitted by the receiving State.⁴⁷

⁴⁷ Article 38.1 of the VCDR.

The inviolability of the private residence of the family members of diplomatic agents and the inviolability of the private residence of the family members of administrative and technical staff are stipulated under Article 37.1 and Article 37.2 respectively. These two articles provide texts which accord the private residences of these family members the same inviolability of the diplomatic agents and administrative and technical staff respectively.⁴⁸ However, an important proviso of these two articles is, if these family members are the nationals or permanent residents of the receiving State, their private residences enjoy no inviolability at all.⁴⁹

The last category of diplomatic premises that may be entitled to inviolability is the temporary residence of the diplomatic courier. Indeed, there is actually no express provision in the VCDR that stipulates the inviolability of the temporary residence of the diplomatic courier. However, it should be noted that under Article 27.5, the personal inviolability of the diplomatic courier is expressly prescribed. Accordingly, it can be argued that the personal inviolability of the diplomatic courier will not be fully realised if his temporary residence within the receiving State is not inviolable. It can be imagined that, without the positive protection of his temporary residence, diplomatic bags that he carries will easily be subjected to unlawful interception. It is worth noting that the inviolability of the residence of the diplomatic courier is expressly mentioned in Article 17 of the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Courier 1989, which states that '[t]he temporary accommodation of the diplomatic courier carrying a diplomatic bag shall, in

⁴⁸ It is debatable whether the private residence of family members who live away from the residence of the diplomatic agents or the administrative and technical staff shall also be entitled to inviolability. State practice varies on this issue. Notably, the practice of the US provides that only those family members who reside exclusively in the household of the diplomatic agents or the administrative and technical staff can enjoy the inviolability under Articles 37.1 and 37.2 of the VCDR.

⁴⁹ Normally, diplomatic agents and the administrative and technical staff live together with their family members and therefore the inviolability of the private residence of their family members is subsumed into the inviolability of their private residence. However, if they actually do not live together in the same residence, attention should be paid with regard to the inviolability of their private residences. In this situation, the decisive factor is whether the concerned family members are the national or permanent members of the receiving State.

principle, be inviolable.’ The fact that the 1989 Draft Articles have yet to be enacted as a treaty suggests that as of now, there is no concrete customary international law rule on the inviolability of the temporary residence of the diplomatic courier. That being said, it is conceivable that the receiving State may grant inviolability on such premises on a reciprocal basis, since Article 47.2 (b) of the VCDR allows State parties to ‘extend to each other more favourable treatment than is required by the provisions of the present Convention’.

3.2 The Principle of Diplomatic Inviolability as Applied to Diplomatic Personnel

The inviolability of diplomatic personnel is another important category to which the principle of diplomatic inviolability applies. As a matter of fact, the personal inviolability of diplomatic agents is generally regarded as one of the oldest established rules of international law and its fundamental importance within the regime of diplomatic law is always emphasised.⁵⁰ Under the contemporary regime of diplomatic law, the inviolability of diplomatic personnel has been elaborately stipulated in the VCDR. Basically, the stipulation covers the following categories of personnel: diplomatic agents, administrative and technical staff, the family members of the diplomatic agents and of the administrative and technical staff, and, finally, diplomatic couriers.

3.2.1 The Inviolability of Diplomatic Agents

The personal inviolability of diplomatic agents has been expressly stipulated under Article 29 of the VCDR, which states:

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and

⁵⁰ Roberts (n 5) para 9.2; Denza (n 10) 256. See also CE Wilson, *Diplomatic Privileges and Immunities* (University of Arizona Press 1967) 46; SE Nahlik, ‘Development of Diplomatic Law: Selected Problems’ (1990) 222 *Recueil Des Cours* 187, 248.

shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Similar to the text of Article 22 which stipulates the inviolability of mission premises, the above text of Article 29 reflects the two distinct aspects of the concept of inviolability and accordingly prescribes two kinds of duty for the receiving State: the first and second sentence of Article 29 reflect the first aspect of inviolability and stipulate a form of negative duty for the receiving State, while the third sentence reflects the second aspect of inviolability and stipulates a positive duty. The following sections will provide further elaboration for the inviolability of diplomatic agents, based on this important article and other relevant articles in the VCDR.

a) The meaning of ‘diplomatic agent’

The very first conceptual point concerning the personal inviolability of diplomatic agents concerns who is entitled to be identified as a ‘diplomatic agent’ under the current regime of the VCDR. According to Article 1 of the VCDR, a ‘diplomatic agent’ is ‘the head of the mission or a member of the diplomatic staff of the mission’, while the ‘members of the diplomatic staff’ are those members of the staff of the mission ‘having diplomatic rank’.⁵¹ As Salmon suggests, these members ‘often belong to a group of public officials in the Ministry of Foreign Affairs—whatever its name in any given country employed in the Foreign Service’.⁵² To be more specific, these include ‘ministers, minister-counsellors, counsellors, first, second and third secretaries, and attachés having diplomatic status’.⁵³ It is worth noting that some writers argue that even the so-called ‘part-time’ diplomats can be regarded within the category of diplomatic agents and thus entitled to personal inviolability, as long as they are ‘performing

⁵¹ See Article 1 (d) and 1 (e) of the VCDR.

⁵² J Salmon, ‘Members of the Staff of Diplomatic Missions’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol VII, 75, para 10.

⁵³ Ibid.

diplomatic functions as a principal, and not an incidental, part of their duties'.⁵⁴ In this case, it must be noted that according to Article 10.1(a), the receiving State should be notified of the appointment and arrival of such 'part-time' diplomatic agents, and under Article 11.2, the receiving State may refuse to accept 'part-time' diplomatic agent.

b) The negative duty of not taking any enforcement measure against the diplomatic agent

Under Article 29, a diplomatic agent shall not be subjected to any kind of enforcement measures by the authorities of the receiving State. The text of Article 29 expressly mentions 'arrest or detention' as typical examples of such measures. However, it is undoubtedly the case that this enumeration is by no means exhaustive. Indeed, other measures of a similar nature may also be considered as contravention of the personal inviolability of the diplomatic agent and should not be allowed, such as having physical search by the police or taking a breathalyzer test or involuntary electronic screening.⁵⁵ In addition, personal service of legal process is also prohibited against the diplomatic agent.⁵⁶ In short, the essence of the first aspect of the personal inviolability of a diplomatic agent grants a status that exempts the diplomatic agent 'from certain measures that would amount to direct coercion'.⁵⁷ Accordingly, the authorities of the receiving State should abstain from adopting any measures of such nature.

Although the text of Article 29 is straightforward and self-explanatory, the actual application of the personal inviolability of diplomatic agents under Article 29 reveals

⁵⁴ Wilson (n 50) 157. See also JC Barker, *The Protection of Diplomatic Personnel* (Ashgate 2006) 17.

⁵⁵ R van Alebeek, 'Immunity, Diplomatic' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol V, 98, para 26; Roberts (n 5) para 9.5.

⁵⁶ Van Alebeek (n 55) para 26; Denza (n 10) 268-269.

⁵⁷ Commentary on the ILC's Draft Articles (n 2) 97. Sir Roberts suggests that a diplomatic agent 'who is suspected of an offence may be invited to accompany a police officer to a police station so that his identity and status may be verified'. It is quite clear that such measures does not amount to a 'direct coercion' and therefore is not a contravention of the personal inviolability of the diplomatic agent. See Roberts (n 5) para 9.3.

some thorny issues. First of all, just as with the inviolability of mission premises under Article 22, there is no exception mentioned in Article 29, and therefore, it is generally understood that the personal inviolability of diplomatic agents is absolute.⁵⁸ It is not surprising that the absolute inviolability of the diplomatic agent has caused considerable controversy, in much the same way as occurred in relation to the application of the unqualified inviolability of mission premises. Dembinski has commented that the absolute inviolability of diplomatic agents could be contrary to the general principle of functional necessity, and could also make the receiving State less capable of protecting its own 'vital interests'.⁵⁹ Indeed, the absolute inviolability of diplomatic agents may be seen as controversial when certain incidents occur. Such controversy mainly rises in the following two kinds of scenarios.

The first scenario is when a diplomatic agent is carrying out certain activities that are deemed by the receiving State as dangerous to its national security. Such activities include, but are not limited to: practising espionage, illicitly entering into restricted areas, sponsoring anti-government groups, aiding or training anti-government activists, to list but a few.⁶⁰ Obviously, spying or other subversive activities are incompatible with the duty of diplomatic agents that is laid down in Article 41.1 of the VCDR, which states:

Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

⁵⁸ Roberts (n 5) para 9.4; Barker (n 54) 69-70; Denza (n 10) 257-258.

⁵⁹ L Dembinski, *The Modern Law of Diplomacy* (Martinus Nijhoff 1988) 197.

⁶⁰ Such activities usually resulted in the declaration of *persona non grata* of diplomats. During the high tide of the Cold War, there were many occasions that large numbers of Soviet diplomats were declared *persona non grata* and expelled by the receiving State, owing to their espionage or subversive activities. See Denza (n 10) 78-79.

It is beyond doubt that the abovementioned activities either violate the duty of respecting the law of the receiving State or violate the duty of non-interference with the internal affairs of the receiving State. However, thanks to absolute inviolability under Article 29, the receiving State is required not to take actions directly against the diplomatic agent. Instead, the authorities of the receiving State can only declare the diplomatic agent *persona non grata*, as per Article 9 of the VCDR.⁶¹

The second kind of scenario is when a diplomatic agent is practising serious criminal activities or doing something that directly endangers public safety. Typical situations of such nature include drink driving, shooting in the street, smuggling drugs or other illegal contraband, to list but a few.⁶² Under these situations the authorities of the receiving State (usually the local police officers) must balance the personal inviolability of diplomatic agents on the one hand, and public safety on the other hand. The strict application of Article 29 requires the authorities not to take any coercive measures against the diplomatic agents. However, it may be impossible to bring such emergency situation under control without doing something that actually physically impedes the diplomatic agent. Nevertheless, unlike the unqualified inviolability of mission premises which almost preclude any possible contravention of the inviolability, the possibility of overriding the absolute inviolability of diplomatic agents if the risk to the public is considered as ‘extreme and continuing character’ is supported by writers and case law.⁶³ The abovementioned two scenarios reflect similar theoretical controversies that arise from the unqualified inviolability of mission premises. These controversies will be further analysed in Chapter 5.

⁶¹ Ibid 77.

⁶² The shooting incident in St James Square in London on 17 April 1984 is the most infamous example. See n 19 above.

⁶³ Denza (n 10) 267-268.

c) The positive duty of protecting the diplomatic agent

In addition to the negative duty of not taking any enforcement measures against diplomatic agents, Article 29 also elaborates the duty of positive protection of diplomatic agents by the authorities of the receiving State. Such protection, like the protection of mission premises, includes not only physical protection but also the prevention of any attack on the diplomatic agent's 'dignity'.

The physical protection of diplomatic agents has been long established not only as comity but also a legal practice ever since the Classical Periods of the seventeenth and eighteenth century.⁶⁴ The increasing frequency of attacks, kidnapping and assassination attempts on the person of diplomatic agents during the second half of the twentieth century and into the twenty-first century makes such protection even more significant.⁶⁵ Under the regime of the VCDR, the duty of physical protection of the diplomatic agent requires that the authorities of the receiving State should 'take all appropriate steps' to prevent any physical attack on the diplomatic agent. Here again the term 'all appropriate steps' is not defined. What is clear is that such appropriate steps include 'the provision of a special guard where circumstances so require'.⁶⁶ It is suggested that the word 'appropriate' implies that the protection of the diplomatic agents 'must be proportionate to the perceived threat'.⁶⁷ However, it is worth noting that how to determine 'proportionate' is a fairly difficult task and should be considered by the authorities of the receiving State under the particular circumstances. In certain emergency situations, the extent of protection should be higher than normal, especially when the mission premises are under siege or even under attack by a violent mob.⁶⁸ However, such

⁶⁴ See Chapter 2, section 2.2.3. See also Barker (n 54) 45-46.

⁶⁵ Denza (n 10) 258-259.

⁶⁶ Commentary on the ILC's Draft Articles (n 2) 97. See also Denza (n 10) 262-263.

⁶⁷ Van Alebeek (n 55) para 27.

⁶⁸ For instance, see *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, 11-13, para 16-18.

‘appropriate steps’ never require that the receiving State must ‘do everything’ to fulfil the duty of protection. For instance, the receiving State has no duty to succumb to the terms set by terrorists so as to secure the release of a kidnapped diplomatic agent, although the receiving State should endeavour to take all necessary actions to realise the release.⁶⁹

It is also arguable whether the receiving State has a duty under Article 29 to make specific legislation dealing with the punishment of crimes against diplomatic agents. With the adoption and entry into force of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973,⁷⁰ State parties are required to make crimes against diplomatic agents punishable,⁷¹ while Article 2.3 reiterates the duty of protection as detailed in Article 29 of the VCDR.

With regard to the protection of the dignity of diplomatic agents, another thorny issue arises. On one hand, the receiving State is responsible to prevent diplomatic agents from the insulting or offensive conduct of private individuals. On the other hand, modern constitutional law of democratic countries as well as various international human rights treaties prescribe the freedom of speech of citizens. Thus, the authorities of the receiving State are frequently faced with the issue of determining whether certain conduct by private individuals constitutes an attack on the dignity of a particular diplomatic agent. Typical conduct of this nature includes writing ironic articles or comics in newspapers that expressly refer to the diplomatic agent, verbal abuse during a personal confrontation between the individual and the diplomatic agent, and so on.⁷²

⁶⁹ Denza (n 10) 259-260.

⁷⁰ 1035 UNTS 167 (adopted 14 December 1973, entered into force 20 February 1977). As of June 2014, there are 176 states become parties to this Convention. Hereafter referred to as ‘the IPP Convention’.

⁷¹ Article 2.2 of the IPP Convention.

⁷² The most well-known case is *Respublica v De Longchamps*. See 1 US 111 (1784), (Justia.com) <<http://supreme.justia.com/cases/federal/us/1/111/case.html>> accessed 26 June 2014.

Although the dignity of the diplomatic agent is somehow easier to define than that of the diplomatic mission,⁷³ in some marginal cases, the discretion of the authorities of the receiving State remains controversial.⁷⁴ Furthermore, the exact measures a receiving State can adopt in order to protect the dignity of the diplomatic agents remains debatable. These controversies will be further discussed later in Chapter 6.

d) The duration of the inviolability of diplomatic agents

Unlike the commencement and termination of the inviolability of mission premises, details of the commencement and termination of the inviolability of diplomatic agents are elaborately stipulated in the VCDR. According to Article 39:

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict.

The above provisions are mainly self-explanatory, but two practical issues are worth noting. First, with regard to the commencement of the inviolability of diplomatic agents, the stipulation of Article 39.1 infers that the receiving State shall begin to provide for the positive protection of the diplomatic agent at the moment that ‘he enters the territory’. It is worth mentioning that under Article 10.1 (a), the receiving State shall be notified of the appointment and arrival of diplomatic agents. Meanwhile, Article 10.2

⁷³ Criminal law of most countries has specific provisions dealing with attack on personal dignity, such as the crime of libel and slander.

⁷⁴ ‘Two Detained for Harassing Japanese Envoy’s Car’ (*China Daily*, 4 September 2012) <http://www.chinadaily.com.cn/china/2012-09/04/content_15733771.htm>accessed 26 June 2014. In this incident, the Japanese ambassador was by no means threatened physically, yet it is obvious that his personal dignity was impaired.

requires that prior notification of arrival shall be given ‘where possible’. Such wording by no means suggests a compulsory duty of the sending State to notify the receiving State of the arrival of its diplomatic agents in advance. However, it can be argued that if no prior notification is sent to the receiving State, the receiving State may not be able to provide positive protection upon the arrival of the diplomatic agents. For example, if a diplomatic agent arrives at the border (usually an airport) of the receiving State and is physically attacked by private individuals, the receiving State may argue that it has no responsibility for the failure of positive protection, for the reason that it had not been notified by the sending State of the arrival time of the diplomatic agent and was therefore unable to provide the required level of protection.

Secondly, with regard to the termination of the inviolability of diplomatic agents, the phrase ‘when he leaves the country’ in Article 39.2 normally refers to the moment that the diplomatic agent leaves permanently.⁷⁵ The term ‘reasonable period’, as discussed in section 3.1.1 above, does not have a specific duration. State practice varies from several weeks to six months, or even a year.⁷⁶ In some unusual cases, especially when the diplomatic relations between the sending and receiving State are in trouble, or the diplomatic agent has already been declared *persona non grata* by the receiving State, such ‘reasonable period’ may be specified by the receiving State and usually it is fairly short.⁷⁷

e) Special cases: the inviolability of diplomatic agents in transit in a third State; the inviolability of diplomatic agents who are nationals or permanent residents of the receiving State

In addition to the two distinct aspects of inviolability, two further issues are worth noting: the inviolability of diplomatic agents in transit and the inviolability of

⁷⁵ Denza (n 10) 435-436.

⁷⁶ Van Alebeek (n 55) para 39.

⁷⁷ Ibid. See also Denza (n 10) 437.

diplomatic agents who are nationals or permanent residents of the receiving State. Both cases are expressly stipulated in the VCDR. Under these two special cases, the extent of the inviolability is slightly different from the normal case.

The rule regarding the inviolability of diplomatic agents in transit in a third State has been generally recognised in practice since the nineteenth century.⁷⁸ The rule is now codified in Article 40.1 of the VCDR, which expressly stipulates that the third State shall accord inviolability to the diplomatic agent. It is quite obvious that the inviolability referred to in the text of Article 40.1 is the personal inviolability of the diplomatic agent.⁷⁹ The inviolability here covers the two aspects: the immunity from any kind of enforcement and the positive duty of protection by the authorities of the third State. Whereas the first aspect of inviolability is not difficult to be observed, the extent of the protection may be subjected to debate. Whether the authorities of the third State have the same degree of duty to provide positive protection to the diplomatic agent in transit through its territory remains unclear. It is understandable that usually the duty of protection by the third State is not as positive as that of the receiving State for the reason that it is neither compulsory nor necessary that the third State should be notified of the entry into its territory of the diplomatic agent from the sending State. Nevertheless, here the principle of proportionality should be considered: if the diplomatic agent feels unsafe and request protection, the authorities of the third State should provide enough protection as requested.

Another special case is the personal inviolability of diplomatic agents who are nationals or permanent residents of the receiving State. Under Article 38.1 of the VCDR, if the diplomatic agent is a national or permanent resident of the receiving State, he shall only have inviolability ‘in respect of official acts performed in the exercise of his functions’. Although the exact meaning of the term ‘official acts’ is not clearly defined in the VCDR, it is suggested that Article 3, which lists the major functions of a diplomatic

⁷⁸ See Chapter 2, section 2.2.4.

⁷⁹ Denza (n 10) 454.

mission, can be regarded as a close reference to the determination of the ‘official acts’ of diplomatic agents. That is to say, a diplomatic agent that carries out any of the diplomatic functions listed in Article 3 shall generally be deemed to be doing ‘official acts’.

3.2.2 The Inviolability of the Administrative and Technical Staff

In addition to the inviolability of diplomatic agents, the members of the administrative and technical staff are also entitled to personal inviolability under the regime of the VCDR. The phrase ‘administrative and technical staff’ is defined in Article 1 (f) as ‘members of the staff of the mission employed in the administrative and technical service of the mission’. Mission staff belonging to these two categories generally includes typists, cipher clerks, communications engineers, mission archivists, and interpreters, to list but a few.⁸⁰ The granting of inviolability to these two kinds of staff definitely reflects the general trend that these members of staff are essential to some of the diplomatic functions, as well as the daily work of a modern diplomatic mission. Indeed, some of them (such as cipher clerk and mission archivist) are even essential to ensure the security of certain secret information and documents.⁸¹ The personal inviolability of the administrative and technical staff is prescribed under Article 37.2 of the VCDR:

Members of the administrative and technical staff of the mission...shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35.

The text of Article 37.2 suggests that the extent of the inviolability of the administrative and technical staff should be exactly the same as that of the diplomatic agent as

⁸⁰ Denza elaborates that the members of the administrative and technical staff generally performs administrative and technical service of the diplomatic mission, such as interpretation, secretarial, clerical, social, financial, security and communication services. See Denza (n 10) 18.

⁸¹ Ibid 404. See also Commentary on the ILC’s Draft Articles (n 2) 101-102, where paragraph (8) of the commentary on the Draft Article 36 incisively summarises the reasons for providing inviolability for the administrative and technical staff.

stipulated in Article 29. They should not be arrested or detained by the authorities of the receiving State. They also enjoy the same kind of positive protection from any attack on their persons or dignity, though it may be argued that the degree of protection may not be as significant as that of diplomatic agents. Here the principle of proportionality once again applies: with regard to several key posts within the mission, such as a mission archivist or a cipher clerk, his or her personal inviolability may be much more important than that of a typist or an interpreter. The degree of protection is therefore determined by the importance of the relevant post, as well as the necessity of keeping sensitive documents safe from any kinds of harassment or attack.

With regard to the members of the administrative and technical staff who are nationals or permanent residents of the receiving State, there is no obvious inviolability conferred upon them. However, Article 38.2 of the VCDR suggests that the members of the administrative and technical staff who are nationals or permanent residents of the receiving State may still be granted inviolability if the receiving State admits such inviolability upon them. The text of Article 38.2 also implies that these staff may have a limited inviolability during their performance of the functions of the mission.

3.2.3 The Inviolability of the Family Members of Diplomatic Agents and those of the Administrative and Technical Staff

Personal inviolability of the family members of diplomatic agents has been recognised in customary international law since the Classical Periods of the seventeenth and eighteenth centuries.⁸² The reason for granting such inviolability to close members of a diplomatic agent is that such inviolability is essential to the independence of a diplomatic agent.⁸³ Without the inviolability of his family members, the diplomatic agent may easily be harassed and therefore be hampered from carrying out his diplomatic functions.⁸⁴ In the VCDR, the term ‘family members’ is further elaborated as

⁸² See Chapter 2, section 2.2.4. See also Denza (n 10) 391.

⁸³ Denza (n 10) 391-392.

⁸⁴ Ibid 393.

‘the members of the family of a diplomatic agent forming part of his household’.⁸⁵ Although there is no precise definition of this phrase in the VCDR, it is generally agreed that the term mainly covers the immediate family of the diplomatic agent, including his wife and children below the age of majority.⁸⁶ Indeed, State practice on the category of family members varies and this issue generally reflects the differences among States in their social and culture values.⁸⁷

Under the regime of the VCDR, the inviolability of the family members of diplomatic agents is prescribed in Article 37.1, while the inviolability of the family members of the administrative and technical staff is prescribed in Article 37.2. These two provisions provide the family members of these staff with the same inviolability as the official, if they are not the nationals or permanent residents of the receiving State: they are immune from arrest, detention or any kind of interference by the authorities of the receiving State, and they should be positively protected from any kind of physical attack or impairment of their dignity.

With regard to the family members of the diplomatic agent who are actually nationals or permanent residents of the receiving State, they generally do not enjoy any kind of inviolability. This can be inferred from the text of Article 38.1, which provides that a diplomatic agent who is a national or permanent resident of the receiving State only enjoys inviolability ‘in respect of official acts performed in the exercise of his

⁸⁵ Article 37.1 of the VCDR. A similar expression can be found in Article 37.2 which mentions the family members of the administrative and technical staff.

⁸⁶ Denza (n 10) 393. See *Public Prosecutor v LC* (2002) in which the Belgium Court of Appeal held that the receiving State should ‘take all appropriate steps to prevent any attack on [the diplomat’s child’s] person, freedom or dignity’. See *Public Prosecutor v LC* (2002-2003) 8 *Rechtskundig Weekblad* 301, para 3; ‘*Public Prosecutor v LC*’ at ‘Oxford Public International Law’ <<http://opil.ouplaw.com/view/10.1093/law/ildc/46be02.case.1/law-ildc-46be02>>accessed 26 June 2014, para H3.

⁸⁷ For example, some States accept same sex spouse as a family member (eg, the UK) while others do not (eg, China). Similarly, some States accept a second wife of a polygamous married diplomat as a family member (eg, The US) while others do not (eg, the UK). See *ibid* 394-396; See also van Alebeek (n 55) para 43.

functions'. It is obvious that family members of a diplomatic agent generally do not perform any kind of official acts in the exercise of diplomatic functions. Therefore, it can be concluded that they are not entitled to the same inviolability as a diplomatic agent who is a national or permanent resident of the receiving State. It is also worth noting that the text of Article 37.1 only mentions the family members of a diplomatic agent who are nationals of the receiving State, but does not mention those who are permanent residents of the receiving State. In fact, this may only be a technical omission during the drafting process of the VCDR.⁸⁸ Finally, with respect to the family members of the administrative and technical staff who are nationals or permanent residents of the receiving State, they usually have no inviolability at all.⁸⁹

3.2.4 The Inviolability of Diplomatic Couriers

The last category of persons entitled to personal inviolability under the VCDR is diplomatic couriers. The term 'diplomatic courier' is not strictly defined in the VCDR, but it is defined in Article 3.1(1) of the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Courier 1989 as:

'[A] person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier *ad hoc*, as a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations 1961'.⁹⁰

The related provision providing the 'meaning' of diplomatic courier within the VCDR is Article 27.5, which states:

The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be

⁸⁸ Denza (n 10) 425.

⁸⁹ Ibid.

⁹⁰ The Commentary on the 1989 Draft Articles points out the two substantive and indispensable elements of a diplomatic courier: his function or duty as a custodian of the diplomatic bag, charged with its transportation and delivery to its consignee, and his official capacity or official authorization by the competent authorities of the sending State. See YILC [1989] vol II, 16.

protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

It is clearly stipulated in Article 27.5 that the diplomatic courier must have an official document to prove his status as a diplomatic courier. This is also an essential requirement of his entitlement to personal inviolability. The necessity for such inviolability is unarguably based on ‘functional necessity’, which can be inferred from the phrase ‘performance of his functions’ in Article 27.5. The extent of the inviolability is elaborated in the text of Article 27.5 as ‘shall be protected’ and ‘shall not be liable to any form of arrest or detention’. Obviously, the two distinct aspects of inviolability are well stipulated.⁹¹ Interestingly, the text of Article 27.5 does not expressly mention the protection of the dignity of the diplomatic courier. Nevertheless, it is likely that the dignity of the diplomatic courier is an integral part of his personal inviolability, and so, it can be concluded that the protection of the inviolability of the diplomatic courier should include the positive protection of his personal dignity.⁹²

With regard to the so-called ‘diplomatic couriers *ad hoc*’,⁹³ they shall enjoy same kind of inviolability as professional couriers, save that their inviolability ‘shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge’.⁹⁴ Normally, an *ad hoc* courier ‘departs almost immediately bearing diplomatic bags from the mission to the sending government or for delivery elsewhere’, which means he usually renews his inviolability almost immediately after his former inviolability ends. However, it is possible that his inviolable status will lapse if he remains in the receiving

⁹¹ It is pointed out in the Commentary on the 1989 Draft Articles that ‘the personal inviolability of the diplomatic courier comes very close in its scope and legal implications to that of a diplomatic agent’. See *ibid* 27.

⁹² The Commentary on the 1989 Draft Articles confirms this suggestion. See *ibid*.

⁹³ The phrase ‘diplomatic courier *ad hoc*’ is neither defined in the VCDR nor in the 1989 Draft Articles. In the Commentary on the 1989 Draft Articles, it suggests that such an ‘*ad hoc* courier’ generally ‘performs all the functions of the diplomatic courier, but only for a special occasion’. See *ibid* 16.

⁹⁴ Article 27.6 of the VCDR.

or transit State without carrying out his normal function of delivery.⁹⁵ Such a possibility also reflects that the very nature of the inviolability of diplomatic couriers is based on ‘functional necessity’.

3.3 The Principle of Diplomatic Inviolability as Applied to Diplomatic Property

The third and last category to which the principle of diplomatic inviolability applies is diplomatic property. This category includes a wide range of things affiliated to either the diplomatic mission or the diplomatic agent. Accordingly, a distinct feature of the inviolability of diplomatic property is that such inviolability generally reflects the derivative nature of the property. The inviolability of diplomatic property covers the following three major categories of property: the mission property; the diplomatic archives, diplomatic correspondence and diplomatic bag; the private property of diplomatic personnel.

3.3.1 The Inviolability of Mission Property

Of all the different kinds of diplomatic property, the property of a diplomatic mission is perhaps the most important, for it covers the most extensive range of items within the diplomatic mission. The rules concerning the inviolability of the property of a diplomatic mission were gradually established during the Renaissance and the Classical Periods.⁹⁶ It is well recognised that such inviolability came into existence following the rise of resident embassy during the Renaissance.⁹⁷ It is in this regard that the inviolability of the mission property is actually derived from the inviolability of mission premises. Under the cotemporary regime of the VCDR, the inviolability of mission property is stipulated in Article 22.3, which states:

⁹⁵ Denza (n 10) 251.

⁹⁶ See Chapter 2, section 2.2.3.

⁹⁷ A Eyffinger, ‘Diplomacy’ in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 820-821.

The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

The text of Article 22.3 mentions three kinds of mission property: the mission premises, other property of the mission, and the means of transport of the mission. The first kind of mission property is actually the mission premises. It is worth noting that in Article 22.3 the mission premises are treated as a kind of diplomatic property which denotes not only the premises but also the land on which the premises are built. Accordingly, the inviolability of mission premises prescribed in Article 22.3 differs from the inviolability stipulated in Article 22.1. In Article 22.1, the inviolability of mission premises denotes a kind of immunity against instant enforcement, that is, entry into the mission premises, while in Article 22.3 the inviolability generally denotes a kind of immunity against non-instant enforcement. The non-instant enforcement in this regard usually involves the expropriation of the premises or the land for public use by the receiving State.

The issue of expropriation of mission premises was mentioned in the Commentary on the ILC's Draft Articles 1958 which suggested a possible exception to the absolute inviolability of the mission premises for the reason that 'real property is subject to the laws' of the receiving State. In this case, the sending State is required to 'cooperate in every way in the implementation of the plan' of the receiving State.⁹⁸ It can be inferred from the above two sentences that for some of the drafters, the absolute inviolability of mission premises may have been open to being overwhelmed by the land law of the receiving State if such law prescribes the right to expropriation. However, the final text of Article 22.3 simply makes such exception impossible. State practice following the adoption of the VCDR also proves that such expropriation without the consent of the sending State will be deemed as contravention of the inviolability of mission premises and therefore, it can be concluded that the inviolability of mission premises in Article 22.3 is deemed absolute, just like the absolute inviolability in Article 22.1.

⁹⁸ Commentary on the ILC's Draft Articles (n 2) 95.

The second kind of mission property is stipulated in Article 22.3 of the Vienna Convention as ‘furnishings and other property thereon’. This term obviously denotes all the property within the mission premises which is accordingly immune from search, requisition, attachment or execution from the authorities of the receiving State. It seems that the inviolability of other property of the mission in Article 22.3 is redundant, for ‘acts referred to [in Article 22.3] could not be performed without a contravention of [Article 22.1]’.⁹⁹ Nevertheless, such stipulation obviously enhances the inviolability of mission premises for the reason that it precludes any possibility that the authorities of the receiving State are entitled to enter the mission premises in pursuance of a judicial order over the mission property.¹⁰⁰ Obviously, the inviolability of mission premises and all the property within the premises as stipulated in Article 22.3 complements the inviolability of mission premises in Article 22.1, and these two provisions together with the entitlement to positive protection in Article 22.2 make the inviolability of mission premises consummate.

The third kind of mission property that is entitled to inviolability is the means of transport of the mission. The phrase ‘means of the transport of the mission’ is not defined in the VCDR so its meaning may change with the development of transportation technology. It can be suggested that nowadays, the means of transport of a diplomatic mission may not be limited to cars. Other kinds of vehicles as well as helicopters or even motorboats can be regarded as ‘means of transport’ of the mission. Whatever the specific vehicles that the phrase ‘means of transport of the mission’ is referring to, it can be inferred from the text of Article 22.3 that they are entitled to the same kind of inviolability as other mission property if they are within the premises. If they are outside the mission premises, their inviolability will become somehow limited,¹⁰¹ though they

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ A typical example is that the vehicle which is causing serious traffic obstruction can be towed away (but not clamped) by the local authorities of the receiving State. As pointed out in the UK Foreign Affairs Committee’s Report, clamping is a measure that ‘must be regarded as penal in intent and effect’ and violates the inviolability. See ‘The Abuse of Diplomatic Immunities and Privileges’ (n 19) para 77. See

are still entitled to the immunity from direct enforcement such as those actions listed in Article 22.3.

Last but not least, it is worth noting that the text of Article 22.3 of the Vienna Convention does not expressly mention the positive protection of the mission property. Nevertheless, it is easy to notice that for all the mission property that is located within the mission premises, their protection is actually incorporated and covered in the protection of the mission premises in Article 22.2. With regard to the means of transport of the mission, their protection is also covered by the positive protection of diplomatic agents under Article 30 if the diplomatic agent is riding in the vehicle..

3.3.2 The Inviolability of Diplomatic Archives, Diplomatic Correspondence and the Diplomatic Bag

The second category of diplomatic property covers three kinds of items that are of a vital and confidential nature: the diplomatic archives, the diplomatic correspondence and the diplomatic bag. Their inviolable status is essential to the vital diplomatic functions of a diplomatic mission, as well as to the communication between the diplomatic mission and various organs of the sending State. Their inviolability will be analysed in the following three subsections.

a) The inviolability of diplomatic archives

The inviolability of diplomatic archives is prescribed in Article 24 of the Vienna Convention, which states:

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

The text of Article 24 obviously fails to provide an exact definition of the term ‘archives and documents of the mission’. In fact, the term ‘diplomatic archives’ is not defined anywhere in the VCDR. Nevertheless, a similar term, ‘consular archives’ is defined

also Denza (n 10) 160; van Alebeek (n 55) para 15.

clearly in the Vienna Convention on Consular Relations 1963,¹⁰² where Article 1.1(k) states:

‘[C]onsular archives’ includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safe keeping.

This definition is generally deemed as applicable to the diplomatic archives as mentioned in Article 24 of the VCDR.¹⁰³ It is worth noting that the term ‘documents’ is accordingly incorporated into ‘archives’. Also, it is well accepted that with the development of science and technology, new forms of data storage as well as new electronic forms can be added to the already extensive meaning of the term ‘archives’. Indeed, the above definition is so extensive that even correspondence and furniture the inviolability of which are covered by other articles of the VCDR are also covered by Article 24.¹⁰⁴ Such a stipulation is by no means repetitive. Instead, it reflects the very fact that these items are of vital importance and their inviolable status must be emphasized, if not enhanced by different provisions within the VCDR.¹⁰⁵

Like all other kinds of terms that are dubbed with ‘inviolability’ in the Vienna Convention, the inviolability of diplomatic archives denotes two distinct aspects: the archives should be immune from any kind of interference by the receiving State, and meanwhile, they should be positively protected by the receiving State. With regard to

¹⁰² 596 UNTS 261 (adopted 24 April 1963, entered into force 19 March 1967). Hereafter referred as the VCCR.

¹⁰³ Denza (n 10) 195. See also T Fitschen, ‘Archives’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol I, 560, para 10.

¹⁰⁴ The inviolability of diplomatic correspondence and the inviolability of furniture within the mission premises are stipulated in Articles 27.2 and 22.3 respectively. It is also worth noting that diplomatic archives themselves obviously enjoy the inviolability as a kind of mission property under Article 22.3 if they are located within the mission premises.

¹⁰⁵ It is generally agreed that the inviolability of diplomatic archives in Article 24 exceeds the inviolability of ‘other property’ of the mission as stipulated in Article 22.3. See van Alebeek (n 55) para 16.

the first aspect, it generally requires that the diplomatic archives cannot be searched, seized or detained by the executive authorities of the receiving State.¹⁰⁶ Neither can they be used as evidence in any legal proceedings.¹⁰⁷ It is noteworthy that even if the documents which are recognised as diplomatic archives were stolen or obtained by improper means they do not lose their inviolable status.¹⁰⁸ However, it is worth noting that in the recent *Bancoult Case*, which concerned the illegal leaking of diplomatic correspondence and its use as evidence in legal proceedings,¹⁰⁹ the UK Court of Appeal provided a different opinion on this issue:

[I]t is not necessary to explore the circumstances in which documents removed from a mission without the consent of the sending state may be admitted in evidence. On the assumed facts of the present case, the documents were sent from the US mission in London to Washington with the consent of the sending state and were communicated to the world by a third party. ... There is nothing in the case-law or the writings of the commentators (apart from those of Professor Denza) which says that the use of documents disclosed in such circumstances in legal proceedings would be contrary to articles 24 and 27.2 of the 1961 Convention. ... In our judgment, it makes no sense for the concept of inviolability of the mission to be extended to prevent a document that is in the worldwide public domain from being admitted in proceedings in England and Wales, simply because it emanated

¹⁰⁶ Fitschen (n 103) para 10. See also Roberts (n 5) para 8.30.

¹⁰⁷ Roberts (n 5) para 8.30.

¹⁰⁸ Denza (n 10) 196-197.

¹⁰⁹ *Bancoult v Secretary of State for Foreign and Commonwealth Affairs*, [2014] EWCA Civ 708; [2014] 1 WLR 2921. Another recent case of similar nature is also worth noting. The ICJ in the *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Order)*, emphasised the importance of protecting the confidentiality of archives and correspondence. However, this case concerns State archives and correspondence between the government and its legal advisors, which means that it is not directly about diplomatic archives. Consequently, this case does not provide a particularly useful example for the purposes of the present discussion. That being said, it is worth noting that the protecting of confidentiality of diplomatic archives and correspondence are no less important than State archives. Therefore, the ICJ's decision for granting provisional protective measures on State archives can be seen as vivid illustration of the inviolability of diplomatic archives and correspondence. See *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Order)*, (3 March 2014), para 55. <<http://www.icj-cij.org/docket/files/156/18078.pdf>> accessed 26 June 2014.

from a diplomatic mission in the UK. ... To summarise, we would allow the appeal on the admissibility issue on the narrow basis that admitting the cable in evidence in the instant case did not violate the archive and documents of the US mission, since it had already been disclosed to the world by a third party.¹¹⁰

Whether the above judgment reflects State practice is subject to debate and criticism. This author fully agrees with the position of Professor Denza. The inviolability stipulated in Article 24 should be interpreted in a restrictive way, for the reason that the essence of the inviolability of diplomatic archives lies in the very fact that diplomatic archives contain confidential materials (such as official documents, correspondence in paperwork or electronic form). Where the archives have been stolen and leaked illegally, in principle, the inviolability should still persist, otherwise the confidentiality of diplomatic archives will be compromised. Obviously, such consequences are not compatible with the purpose of Article 24.

The second aspect of the inviolability requires that the archives should be protected against search, seizure and other forms of interference by the receiving State as well as any private individuals. Such protection is usually incorporated into the protection of the mission premises for the reason that for most of the time, the diplomatic archives are located within the mission premises.

What makes the inviolability of diplomatic archives distinct is that such inviolability has a kind of infinitive temporal and spatial nature. The text of Article 24 expressly mentions 'any time' and 'wherever' to denote such nature. With respect to the temporal application of the inviolability, Article 24 requires that the inviolability of diplomatic archives persists even after diplomatic relations is severed between the sending State and the receiving State, or even during an armed conflict. This is obviously supported by Article 45 of the VCDR which emphasizes the duty of the receiving State to 'respect and protect' the archives during extreme circumstances. Nevertheless, the infinitive temporal aspect of the inviolability of diplomatic archives does not suggest a kind of

¹¹⁰ Ibid para 63-65.

everlasting protection. The general practice is that such inviolability persists for a reasonable period of time and finally ‘lapse[s] along with the inviolability of the mission premises’.¹¹¹

Finally, concerning the spatial aspect of the inviolability, it is generally agreed that prior to the VCDR there was no consistent State practice on the inviolability of mission archives when they were not located within the mission premises.¹¹² It is only after the adoption of the VCDR that the inviolability of diplomatic archives has become firmly established. Since the diplomatic archives are located within the mission premises for most of the time and enjoy the same degree of inviolability as other mission property, the significance of the ubiquitous inviolability in Article 24 lies in the occasions that the archives are outside the mission premise. For example, when the archives are carried in transit by a diplomatic courier or other mission staff and located in that person’s private residence (no matter temporary or permanent), the inviolable status will not be lost.¹¹³

b) The inviolability of the diplomatic correspondence

The inviolability of the diplomatic correspondence is stipulated in Article 27.2 of the VCDR, which states:

The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

The text of Article 27.2 is straightforward and self-explanatory. First of all, it defines what the term ‘official correspondence’ means. Denza has cast doubts on whether only correspondence coming from the mission can be deemed as ‘official correspondence’ under Article 27.2, for during the drafting process in the ILC the term had been referred

¹¹¹ Ibid 190.

¹¹² Ibid 189.

¹¹³ Notably, when the diplomatic archive is carried by a diplomatic courier, its inviolability is protected under both Article 24 and Article 27.3 of the VCDR.

to mail emanating from the mission only.¹¹⁴ The text of Article 27.2 expressly mentions ‘all correspondence’, so it will be imprecise to limit the application of the term to ‘correspondence sent from the mission’ and exclude correspondence sent to the mission.

Secondly, the expressly mentioned term ‘inviolability’ obviously denotes that the diplomatic correspondence should enjoy immunity from any kinds of interference by the authorities of the receiving State. To be specific, diplomatic correspondence should not be opened, detained, or used as evidence during legal proceedings.¹¹⁵ The inviolability of diplomatic correspondence also denotes that all the correspondence should be protected by the authorities of the receiving State from the abovementioned interference. The paradox of such protection lies in the fact that the authorities may not be able to recognise whether specific correspondence sent to the diplomatic mission is ‘diplomatic correspondence’.¹¹⁶ As Denza points out, the text of Article 27.2 does not require the diplomatic correspondence to bear ‘visible external marks’ like that on the diplomatic bags.¹¹⁷ Thus, it can be suggested that the authorities of the receiving State ought to protect all the correspondence that is dispatched to and from the diplomatic mission, or at least not open it. Otherwise, the authorities of the receiving State may run the risk of contravening the inviolability of the diplomatic correspondence.

Finally, it is worth noting that when delivered to the diplomatic mission, the correspondence usually becomes part of the archives and documents of the mission and will gain a much more extensive inviolability as stipulated in Article 24 of the Vienna Convention.¹¹⁸

¹¹⁴ YILC [1958] vol I, 143; Denza (n 10) 225.

¹¹⁵ Once again, the aforementioned *Bancoult Case* is worth noting. See n 109-110 above.

¹¹⁶ Denza (n 10) 226.

¹¹⁷ Ibid.

¹¹⁸ Article 27 does not expressly mention that official correspondence is inviolable whenever and wherever. However, it is without doubt that as soon as the official correspondence becomes archives, it should gain the same degree of inviolability thereafter.

c) The inviolability of the diplomatic bag

The inviolability of the diplomatic bag is perhaps the most important and controversial aspect of the freedom of communication stipulated in Article 27 of the VCDR. As a form of diplomatic property, the vital importance of the inviolability of the diplomatic bag is critically summarised by Sir Ivor Roberts in *Satow's Diplomatic Practice*:

[W]ithout being able to rely on the inviolability of the diplomatic bag an embassy cannot usefully perform its function of observing and reporting to the sending government, and it will be seriously hampered in the conduct of negotiations on any matter of importance if it cannot receive confidential instructions.¹¹⁹

The single specific provision that dealing with the inviolability of the diplomatic bag is Article 27.3 of the VCDR, which provides:

The diplomatic bag shall not be opened or detained.

Furthermore, Article 27.4 elaborates the criteria for determine a diplomatic bag:

The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

Several important points can be summarised from the above two provisions. First of all, in so far as the definition of the diplomatic bag is concerned, it can be seen from the text of Articles 27.3 and 27.4 that there is no detailed definition of the diplomatic bag in either of the provisions. Article 27.4 merely provides the method to distinguish a diplomatic bag from normal packages. According to Article 27.4, a diplomatic bag shall bear the 'visible external marks of their character'. It can be inferred that in absence of such marks, the package will have no such inviolability as specified in Article 27.3. It is also worth noting that the text of Articles 27.3 and 27.4 provides no definitive limit on the size, weight and format of the diplomatic bag.

¹¹⁹ Roberts (n 5) para 8.32.

Secondly, it is worth noting that unlike Article 24 and Article 27.2 which stipulates the inviolability of diplomatic archives, documents and official correspondence, neither Article 27.3 nor Article 27.4 expressly mentions the term ‘inviolability’. So the issue is, whether the wording of Article 27.3 indeed provides inviolability to the diplomatic bag at all? If so, to what extent does the inviolability actually apply? In fact, during the ILC’s ninth and tenth sessions in 1957 and 1958 the crucial issue as to whether the diplomatic bag can possibly be opened under certain circumstances was extensively debated.¹²⁰ Despite several contentious opinions during the ninth session, the Commentary on the ILC’s Draft Articles 1958 finally concluded that the diplomatic bag is inviolable and there are no exceptions whatsoever. The Commentary states:

[T]he diplomatic bag is inviolable. ... The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry of Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 4 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.¹²¹

At the Vienna Conference, the same issue whether the diplomatic bag is inviolable was raised once again.¹²² France, the United States, the United Arab Republic and Ghana all introduced their respective proposals for amending the 1958 Draft Articles on the issue. The French amendment provided that where there are especially serious reasons, the diplomatic bag could be opened in the presence of a representative of the mission.¹²³

¹²⁰ See YILC [1957] vol I, 74-83, 208-209, 227; YILC [1958] vol I, 139.

¹²¹ Commentary on the ILC’s Draft Articles (n 2) 97.

¹²² *United Nations Conference on Diplomatic Intercourse and Immunities: Official Records* (United Nations 1962) vol I, 154-160.

¹²³ *United Nations Conference on Diplomatic Intercourse and Immunities: Official Records* (United Nations 1962) vol II, 20.

The US amendment specified that the diplomatic bag could be opened ‘if in an exceptional case the receiving State has serious grounds’ to suspect the content contained inside the bag and with both the permission of the Ministry of Foreign Affairs of the receiving State and the diplomatic mission. In case the diplomatic mission does not provide its consent, the diplomatic bag ‘may be rejected’.¹²⁴ The United Arab Republic’s amendment specified that the sending State ‘may be required to withdraw the said bag’ in ‘an exceptional case’. The amendment proposed by Ghana mentioned that ‘[i]n case of reasonable suspicion of misuse of any particular bag, the sending State shall have the right to withdraw such bag *unopened*’.¹²⁵ In the following meetings the amendments from France, the US and the United Arab Republic were withdrawn, and the amendment of Ghana was rejected by vote.¹²⁶ The United Arab Republic’s amendment was reintroduced by the UK and was also rejected by vote.¹²⁷ And so, the final result on the issue of inviolability of the diplomatic bag did not change from the 1958 Draft Articles.¹²⁸ Consequently, even though the text of Article 27.3 does not expressly mention ‘inviolability’, it can be inferred from the discussion in the ILC and the voting results at the Vienna Conference that the diplomatic bag is inviolable.¹²⁹

Thirdly, with regard to the practical application of the inviolability, it can be seen that the phrase ‘shall not be opened or detained’ in Article 27.3 specifies the first aspect of its inviolability. The inviolability of diplomatic bag makes it illegal for the authorities of the receiving State to open or detain the diplomatic bag. According to general practice, this aspect of inviolability also prohibits the electronic scanning of the diplomatic

¹²⁴ Ibid 23.

¹²⁵ Ibid 42. Emphasis added.

¹²⁶ Ibid 58. The vote result was 43 to 8, with 14 abstentions.

¹²⁷ Ibid 58-59. The vote result was 37 to 22, with 6 abstentions.

¹²⁸ K Bruns, *A Cornerstone of Modern Diplomacy: Britain and the Negotiation of the 1961 Vienna Convention on Diplomatic Relations* (Bloomsbury 2014) 142-143.

¹²⁹ Nelson, ““Opening” Pandora’s Box: The Status of the Diplomatic Bag in International Relations’ (1989) 12 *Fordham International Law Journal* 494, 504-505.

bag.¹³⁰ It can also be implied from the text of Article 27.3 that as a principle, there is no exception to the inviolability.¹³¹

Fourthly, while Articles 27.3 and 27.4 do not expressly mention the protection aspect of the inviolability, it will be absurd to assume that the receiving State has no duty to protect the diplomatic bag. Article 27.3 only provides a kind of immunity from interference from the authorities of the receiving State. However, it is quite obvious that without the positive protection by the receiving State, the diplomatic bag, which usually contains important and classified documents, may be subjected to interference by private individuals other than the authorities of the receiving State. Therefore, the protection aspect of the inviolability of the diplomatic bag, though not expressly mentioned, shall not be overlooked.

The stipulation of the inviolability of the diplomatic bag under Articles 27.3 and 27.4 has raised two major conceptual and practical issues ever since the adoption of the VCDR. Firstly, with regard to the attribution of the diplomatic bag, State practice reveals that the lack of a detailed definition and any specific stipulation on the size, weight and format of the diplomatic bag inevitably brings about debate on whether certain 'package' can be deemed as diplomatic bag. Although it is suggested that normally, a diplomatic bag 'resembles a sack', or may be in the form of 'sack, pouch, envelope or any type of package whatsoever',¹³² it is quite conceivable that in exceptional cases, a diplomatic bag can also be very large and bulky such as a huge container, for it may contain essential office apparatus such as 'photocopying machines,

¹³⁰ Denza (n 10) 239. It is worth noting that Article 28.1 of the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Courier 1989 expressly mentions that the diplomatic bag 'shall be exempt from examination directly or through electronic or other devices'. See also J d'Aspremont, 'Diplomatic Courier and Bag' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol III, 110, para 14.

¹³¹ It is worth noting that the customary international law on the inviolability of the diplomatic bag permits the authorities of the receiving State to 'challenge and return' of a suspect diplomatic bag. This is also the same stipulation in Article 35.3 of the VCCR regarding the limited inviolability of the consular bag.

¹³² *Ibid.*

cipher equipment, computers, and building materials'.¹³³ Whether the receiving State has the right to reject certain forms of package as diplomatic bag and refuse to respect the inviolability of these items remains unclear under the current regime of the VCDR.¹³⁴

Secondly, with regard to the content of the diplomatic bag, Article 27.4 requires that the diplomatic bag shall only contain diplomatic documents or articles 'intended for official use'. The term 'intended for official use' can be construed with the diplomatic functions that are listed in Article 3.1 of the VCDR. The general practice reveals that even if diplomatic bags contain articles which are not diplomatic documents or not 'intended for official use', its inviolability will not be invalidated. It is obvious that the text of Articles 27.3 and 27.4 do not expressly permit the authorities of the receiving State any right to disregard the inviolability of the diplomatic bag in such situations.¹³⁵ Nelson recalls the discussion on this issue in the ILC:

[I]t was proposed that the paragraph providing for the contents of the bag be placed before the provision regarding its inviolability. The majority of the delegates rejected the proposal, fearing that this structure would imply that the inviolability of the bag depended on the observance of the contents-limitation provision. The rejection of this proposal conveys that a majority of the Commission intended the diplomatic bag to be absolutely inviolable, even in the face of possible abuse.¹³⁶

¹³³ Denza (n 10) 231-232. In contrast, State practice reveals that vehicles such as a lorry or aircraft itself may not be considered as a diplomatic bag. See also d'Aspremont, 'Diplomatic Courier and Bag' (n 130) para 10.

¹³⁴ The issue may be partially solved by the conclusion of a bilateral agreement on the regulation of the size and format of the diplomatic bag between the sending and receiving State, as Denza suggests. See Denza (n 10) 232.

¹³⁵ D'Aspremont points out that the inclusion of articles other than those stipulated under Article 27.4 will incur State responsibility of the sending State. Nevertheless, the inviolability of the diplomatic bag shall be observed. See d'Aspremont, 'Diplomatic Courier and Bag' (n 130) para 11.

¹³⁶ Nelson (n 129) 516.

Nevertheless, as many scholars argue, theoretically, even if the abuse of the inviolability of the diplomat bag may not invalidate its inviolable status, practically, it will be absurd to stick to the absolute inviolability of the diplomatic bag if manifest abuse or even threat to human life is evident.¹³⁷ Like the absolute inviolability of the diplomatic premises and diplomatic agents, controversies inevitably arise if such inviolability is confronted with the protection of vital national interest or the need to protect human life. Such controversies are reflected by the fact that a group of Arabic nations have entered reservations to Article 27.¹³⁸ Moreover, the tentative draft of a brand new international convention on the status of the diplomatic bag was also unsuccessful.¹³⁹ The controversies arising from the conflicts between the inviolability of the diplomatic bag and other principles of international law will be further analysed later in Chapter 5.

3.3.3 The Inviolability of the Private Property of the Diplomatic Personnel

The last category of diplomatic property that is entitled to inviolability is the private property of diplomatic personnel. Article 30.2 of the VCDR stipulates the inviolability of the private property of a diplomatic agent:

His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.¹⁴⁰

The inviolability in Article 31.3 has two aspects. The first aspect of the inviolability requires that all the aforementioned property (papers, correspondences and other property of the diplomatic agent) shall be immune from search, inspection, seizure,

¹³⁷ Typical examples of such abuse include but not limited to: using the diplomatic bag to carry weapons, alcohol, piece of art, jewellery, currency, or even human beings that are abducted. See Denza (n 10) 242-243; d'Aspremont, 'Diplomatic Courier and Bag' (n 130) para 13.

¹³⁸ Denza (n 10) 229-230.

¹³⁹ Various controversies on the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not accompanied by Diplomatic Courier 1989 made it unable to become a universal convention. No international conference was held to discuss the draft articles since 1989.

¹⁴⁰ Article 31.3 stipulates the immunity from execution of the diplomatic agent and his private property, except in the three cases that stipulated in Article 31.1.

detention or any other kind of interference.¹⁴¹ The inviolability of the private papers and correspondence of the diplomatic agent is especially vital for the reason that without this kind of inviolability, the authorities of the receiving State may try to use the pretext of searching the private papers and correspondence of the diplomatic agent in order to reveal certain confidential documents of the diplomatic mission. Indeed, it is often difficult to completely distinguish the private correspondence of a diplomatic agent from official correspondence. The stipulation of the inviolability of private papers and correspondence of the diplomatic agent completely removes such possibility and therefore grants a more secure status for the official correspondence. In addition to his private papers and correspondence, the inviolability is also extended to his personal bank account and his private means of transport.¹⁴²

The second aspect of the inviolability of the private property of the diplomatic agent requires that all the aforementioned property shall also be protected by the authorities of the receiving State. It is worth noting that such protection is generally extended to the private property of the diplomatic agent regardless of its location, as long as the property is located within the receiving State.¹⁴³

Finally, it should be noted that, in addition to the private property of the diplomatic agent, under Articles 37.1 and 37.2 of the VCDR, the private property of the family members of the diplomatic agent, the private property of the administrative and technical staff and their family members, if these persons are not nationals or permanent residents of the receiving State, shall also be entitled to the same degree of inviolability as

¹⁴¹ Apart from the stipulation of the three exceptions in Article 31.1, there is one more expressly exception to the inviolability of the private property of the diplomatic agent. That is the possible inspection of the personal baggage of the diplomatic agent under Article 36.2.

¹⁴² Denza (n 10) 277-278; van Alebeek (n 55) para 30 and 32. Like the inviolability of the means of transport of the diplomatic mission, the inviolability of the private means of transport of the diplomatic agent is a limited one. State practice reveals that the private vehicle of the diplomatic agent can be towed away if serious obstruction was caused by the vehicle. However, the vehicle is immune from clamping. In this regard, the extent of the inviolability of the private means of transport of the diplomatic agent is the same as the means of the transport of the diplomatic mission.

¹⁴³ Van Alebeek (n 55) para 30.

that of the diplomatic agent. If the above-mentioned persons are nationals or permanent residents of the receiving State, their private property enjoys no inviolability. Likewise, the private property of other minor mission staff and the diplomatic courier also has no inviolability at all.

Chapter 4 State Responsibility Arises from the Breach of the Principle of Diplomatic Inviolability

In the previous chapter, the substantive rules of the principle of diplomatic inviolability stipulated under the VCDR were thoroughly discussed. The comprehensive stipulation of the rules of the principle of diplomatic inviolability in the VCDR implies that any contravention of these rules by a receiving State will constitute a breach of its international obligations under the VCDR. The breach will form an internationally wrongful act and may ultimately lead to the rise of international responsibility of that State if there is no valid defence to that breach.¹ In contemporary international law, the rules concerning State responsibility are mainly governed by customary international law. In 2001 the ILC adopted its Draft Articles on Responsibility of States for Internationally Wrongful Acts.² The Draft Articles, which have not yet been enacted as a treaty, is nevertheless considered by international scholars as an authoritative and comprehensive codification of the major customary rules of State responsibility.³ The general principles of the law of State responsibility are stipulated in the first three articles of the Draft Articles in which the well-recognised international law principle that ‘every internationally wrongful act of a State entails its international responsibility’

¹ It is well recognised among international law scholars that ‘whenever one state commits an internationally unlawful act against another state, international responsibility is established between the two’. See MN Shaw, *International Law* (6th edn, CUP 2008) 778. See also J Crawford (ed), *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 540; M Dixon, *Textbook on International Law* (7th edn, OUP 2013) 252.

² GAOR 56th Session Sup 10, 43. Hereafter referred as the ‘Draft Articles’.

³ J Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (2002) 96 AJIL 874, 890. See also Dixon (n 1) 253.

is expressly confirmed.⁴ Article 2 of the Draft Articles clearly specifies the two constituent elements of an internationally wrongful act that will give rise to State responsibility:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitute a breach of an international obligation of the State.

Thus, based on Articles 1 and 2, it can be asserted that the key issue to determine the existence of State responsibility is to determine whether there exists a breach of an international obligation of that State, and whether that breach is attributable to that State. The present chapter will focus on a close examination of the two elements of the internationally wrongful act and their relevance to the international obligations of the principle of diplomatic inviolability that are stipulated in the VCDR,⁵ based on the analysis of the specific rules in the Draft Articles. In the first place, the two elements of the internationally wrongful acts that will give rise to the international responsibility of the receiving State will be thoroughly analysed. Then, the possible defences or excuses that may preclude State responsibility arising from the breach of the international obligations of the principle of diplomatic inviolability will be analysed. Finally, the legal consequences of a breach of diplomatic inviolability will be discussed.

⁴ See Article 1 of the Draft Articles.

⁵ It is worth mentioning that apart from the State responsibility arising from the breach of the international obligations of the principle of diplomatic inviolability, State responsibility may also arise from the abuse of the principle of diplomatic inviolability by the diplomatic mission or diplomatic personnel of a sending State. Articles 41.1 and 41.3 of the VCDR expressly require that the diplomatic personnel who has inviolable status also has the duty to respect the laws and regulations of the receiving State. Likewise, the mission premises shall not be used in any manner incompatible with its diplomatic functions. Therefore, it can be inferred from the wording of Articles 41.1 and 41.3 that the abuse of the inviolable status of the diplomatic personnel or diplomatic mission will lead to the rise of State responsibility of the sending State. Owing to the nature and theme of the present thesis, the State responsibility arising from the abuse of the principle of inviolability of the sending State will not be discussed in detail. Relevant issues will be briefly analysed in section 4.2 of this chapter.

Throughout this chapter, various cases and incidents involving the breach of the principle of diplomatic inviolability will be discussed so as to illustrate the principal rules of State responsibility.

4.1 The Elements of an International Wrongful Act in the Context of the Breach of International Obligations of Diplomatic Inviolability

4.1.1 The breach of the international obligations of diplomatic inviolability by the receiving State⁶

As Article 2 of the Draft Articles prescribes, the breach of an international obligation is one of the two elements that constitute an internationally wrongful act. The issue concerning the breach of an international obligation is elaborated in Articles 12 to 15 of the Draft Articles. In the first place, Article 12 stipulates that the existence of a breach of an international obligation by a State occurs:

[W]hen an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

It has been emphasized by scholars that the essence of an internationally wrongful act ‘lies in the non-conformity of the State’s actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation’.⁷ Thus, in the context of the emergence of State responsibility arising from the breach of the international obligations of the principle of diplomatic inviolability by the receiving State, the very first issue is to identify where such international obligations derive from.

⁶ It is worth noting that in some extraordinary cases, a State other than the receiving State can commit an internationally wrongful act that forms a breach of the international obligation of the principle of diplomatic inviolability. See the NATO bombing of the Chinese embassy incident in the following section.

⁷ ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001’, YILC [2001] vol II, 54. See also J Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2001) 124.

Obviously, in contemporary international law, the major source for the international obligations of the principle of diplomatic inviolability is the VCDR. Relevant provisions in the VCDR that stipulate the specific rules of the principle of diplomatic inviolability have been extensively discussed in the previous Chapter. These provisions form the substantive part of the international obligations of the principle of diplomatic inviolability with which a State should comply under the VCDR. In addition to the stipulations of the rules of principle of diplomatic inviolability in the VCDR, similar rules are stipulated in the aforementioned Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1973.⁸ For instance, Article 2.1 prescribes that attack on the inviolability of diplomatic premises and diplomatic personnel should be made by State party to the IPP Convention as a crime under its internal law; Article 2.3 reemphasizes the obligation of the receiving State to provide special protection of the personal freedom and dignity of the diplomatic personnel. These stipulations can be regarded as a set of complementary rules to the stipulations of the principle of diplomatic inviolability under the VCDR.

It is also worth mentioning that the legal obligations derived from the abovementioned two international conventions can be divided into two distinct categories. As Article 2 of the Draft Articles stipulates, a breach of an international obligation which will amount to an internationally wrongful act can be caused either by an act or an omission that is attributable to the State. Accordingly, the first category of obligation concerns the obligation not to conduct enforcement acts against inviolable premises, personnel and property. For instance, Articles 22.1 and 22.3 specifically focus on such an obligation. Indeed, a breach of this kind of obligation always involves a positive ‘act’ of the State. The second category is concerned with the obligation to provide special protection for inviolable premises, personnel and property. For instance, Article 22.2 is a typical

⁸ 1035 UNTS 167 (adopted 14 December 1973, entered into force 20 February 1977). As of June 2014, there are 176 states become parties to this Convention. Hereafter referred to as ‘the IPP Convention’.

stipulation of this kind of obligation. In fact, a breach of this kind of obligation always involves an ‘omission’ of the State.

To sum up, all the aforementioned stipulations form the core source of international legal obligations of the principle of diplomatic inviolability. Any non-conformity of these obligations may constitute a breach of the international obligations and may become an internationally wrongful act and may ultimately give rise to the international responsibility of that State (subject to other relevant rules under the Draft Articles).⁹

Following Article 12, Article 13 of the Draft Articles further stipulates that ‘an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs’. In the context of the international obligations of the principle of diplomatic inviolability, the stipulation of Article 13 suggests that an act performed by a receiving State may not be considered as a breach of the international obligation of the principle of diplomatic inviolability if that State is not a party to the aforementioned two international conventions. Nevertheless, it is worth mentioning that currently, a great many States have ratified both the VCDR and the IPP Convention. As of June 2014, the former has 190 State parties and the latter has 176 State parties. This fact reveals that the rules of the principle of diplomatic inviolability are almost universally applied in contemporary international relations and therefore, the international obligations of the principle of diplomatic inviolability exist extensively among States.

In addition to Articles 12 and 13 of the Draft Articles, Article 14 further elaborates the temporal scope of a breach of an international obligation. First, Article 14.1 stipulates:

The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

⁹ See Section 4.2 for the analysis of possible defences that may preclude wrongfulness.

A vivid example of this circumstance can be seen in the infamous NATO bombing of the Chinese embassy in Belgrade on 7 May, 1999.¹⁰ In this incident, the premises of the Chinese diplomatic mission in Belgrade, capital of Former Federal Republic of Yugoslavia was hit by five laser-guided missiles fired from a US B-2 stealth bomber and resulted in the partial destruction of the mission premises as well as three deaths and more than twenty injuries inside the premises.¹¹ The bombing can be regarded as a flagrant breach of the international obligation of the inviolability of mission premises under Article 22.1 of the VCDR even though in this incident the US is not a receiving State.¹² The nature of the bombing indicates that such a breach is an instant conduct, though the effects of this breach (partial destruction of the mission premises) persist.

Secondly, Article 14.2 provides another circumstance:

The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

A typical example of this circumstance can be found in the *Armed Activities on the Territory of Congo Case*¹³ in which the Ugandan embassy in Kinshasa was attacked by Congolese troops and resulted in the long-term occupation of the embassy premises by

¹⁰ 'NATO Hits Chinese Embassy' (*BBC News*, 8 May 1999) <<http://news.bbc.co.uk/1/hi/world/europe/338424.stm>> accessed 22 June 2014.

¹¹ Ibid. See also K Dumbaugh, 'Chinese Embassy Bombing in Belgrade: Compensation Issues' (*Congressional Research Service*) <<http://congressionalresearch.com/RS20547/document.php>> accessed 26 June 2014.

¹² Obviously, the direct source of the obligation in this incident is the first sentence of Article 22, that is, '[t]he premises of the mission shall be inviolable'. Even though the Vienna Convention on Diplomatic Relations generally deals with relationship between the sending and receiving State, it never precludes the possibility that the legal obligations within its framework also have effect on the relationship between the sending State and a third State.

¹³ *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168.

them.¹⁴ It is obvious that in this case, the long-term occupation of the Ugandan embassy premises by the Congolese troops reflects that the act of the State of Congo (as a receiving State) continues and remains not in conformity with its international obligation under Article 22 of the VCDR and thereby, the occupation can be regarded as a continuing breach of the obligation of the inviolability of mission premises under Article 22 of the VCDR and Congo shall bear State responsibility for such a breach.¹⁵

Finally, Article 14.3 stipulates another circumstance that:

The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Perhaps there is no better example of this than the *Tehran Hostages Case*.¹⁶ In this case, the receiving State, Iran failed to prevent the attack on the US embassy premises. It also failed to prevent the attack on the US diplomatic personnel. Such failure persisted from the very first day of the attack on 4 November 1979 till the final release of the hostages on 20 January 1981, which lasted for a period of more than one year.¹⁷ As a result, the State of Iran failed to fulfil its international obligation under Articles 22 and 29 of the VCDR, and its omission constitutes a breach of the international obligation of the

¹⁴ Ibid para 334-336.

¹⁵ Ibid para 344. See also RU Wittzack, 'Armed Activities on the Territory of the Congo Cases' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol I, 587, para 16. In addition, the Commentary on the Draft Articles on State Responsibility also points out that unlawful occupation of embassy premises is a typical example of the circumstance of continuing wrongful acts. See Crawford (n 7) 136.

¹⁶ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3.

¹⁷ I Buffard and S Wittich, 'United States Diplomatic and Consular Staff in Tehran Case (United States of America v Iran)' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) Vol X, 543, para 2.

VCDR to which the State of Iran is a party. Consequently, State responsibility arises and extends over the entire period of more than a year.

Whether Article 15 of the Draft Articles is also applicable to the breaches of the international obligations of the principle of diplomatic inviolability is subject to discussion. Article 15 elaborates a distinct circumstance when there is a breach of international obligation consisting of a composite act:

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

With regard to the temporal factor, these breaches ‘extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct’.¹⁸ It is arguable whether the systematic breaches of the principle of diplomatic inviolability by the receiving States may also be considered as a breach of such kind. In the infamous *Tehran Hostages Case*, the receiving State, Iran, initially failed to prevent the attack by the armed militants on the US embassy premises and therefore it is responsible for its omission to provide sufficient protection for the US embassy premises.¹⁹ In the following events, the Iranian government actually made no effort to end the illegal occupation of the US embassy premises. It also made no effort to end the hostage crisis.²⁰ Neither did it ever take action to punish the attackers in spite of the fact that

¹⁸ Ibid.

¹⁹ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 66 and 77.

²⁰ Buffard and Wittich (n 17) para 1. See also *ibid*, para 67.

such punishment is required by Article 3 of the IPP Convention to which Iran had been a party since July 1978. Evidence revealed that the government of Iran even showed its approval of the attack and occupation of the embassy premises.²¹ Thus, according to the judgment of the ICJ, the government of Iran should be responsible for:

repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff.²²

The above judgment obviously emphasizes the grave nature of the breaches of the Iranian government's obligation under the VCDR and its vicious impact on the 'very foundations' of the long-established regime of diplomatic law.²³ Thereby, it can be argued that such a systematic breach can be deemed as 'a breach through a series of actions or omissions defined in aggregate as wrongful', and therefore, according to Article 15.2, the breach extends over the entire period from the initial failure to prevent the attack on the US embassy till the end of the occupation of the embassy premises and the final release of the hostages.

4.1.2 The attribution of the breach of the international obligations of diplomatic inviolability to a State

As Article 2 of the Draft Articles prescribes, in addition to the breach of an international obligation, an act or omission will not form an internationally wrongful act unless such act or omission is attributable to that State. It is well recognised that an unlawful act by

²¹ Buffard and Wittich (n 17) para 15. See also *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 73-75.

²² *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 76. The Court in the following paragraph 77 also specified that the inviolability stipulated in Articles 22, 24, 25, 26, 27 and 29 of the VCDR have been infringed, and as a result, the government of Iran should be held responsible for these breaches.

²³ *Ibid* para 86.

private individuals acting for themselves may not be regarded as an act of the State.²⁴ The detailed rules regarding the issue of attribution of the breach of international obligation to the State are stipulated in Articles 4 to 11 of the Draft Articles on State Responsibility. Most of these provisions are applicable to the context of the breach of the international obligations of the principle of diplomatic inviolability.²⁵

In the first place, Articles 4 and 5 clearly stipulate that the conduct of any State organ and the conduct of those persons or entities exercising elements of governmental authority should be regarded as an act of that State. Such kind of act is directly attributable to the State. A typical example that illustrates these two articles is the unauthorised entry into embassy premises by officials of the receiving State, such as police and judicial officers. In February 1973, the Pakistan police were empowered by the Pakistan government to enter into the Iraqi embassy in Islamabad to carry out a search of the embassy premises, in spite of the fact that the Iraqi ambassador Hikmat Sulaiman had refused to give the permission for such a search.²⁶ It is obvious that the unauthorised entry by the Pakistan police constitutes a breach of the obligation of the inviolability of the embassy premises under Article 22 of the VCDR, and according to either Article 4 or Article 5 of the Draft Articles, such an act is deemed as the act of the Pakistan State.²⁷ Thereby, Pakistan was directly responsible for such a breach.

²⁴ Dixon (n 1) 258; see also J Crawford, *State Responsibility: The General Part* (CUP 2013) 113.

²⁵ Article 6, which stipulates the responsibility arising from the conduct of organs placed at the disposal of a State by another State, is nearly inapplicable in the context of breaches of international obligations of diplomatic inviolability.

²⁶ I Roberts (ed), *Satow's Diplomatic Practice* (6th edn, OUP 2009) para 8.11. See also S Saeed, 'Caught! (But What?)' (*The Friday Times*, 4 March 2011) <<http://www.thefridaytimes.com/04032011/page26.shtml>> accessed 22 June 2014.

²⁷ According to Article 4.2, it is the internal law of the State that decides whether police officers fall into the category of 'State organs'. As a result, the conduct of the police officers is attributable to the State based on either Article 4 or Article 5.

Secondly, Article 7 of the Draft Articles stipulates the responsibility that arises from ‘ultra vires’ acts, that is, those acts conducted by persons or entities that exceed the manifested authorisation of the State. According to Article 7, this kind of act shall also be considered an act of the State as long as the person or entity concerned acts in their official capacity, even if the acts actually exceed the original authorisation or contravenes instructions. Thus, in the rare circumstances, when the police officials of the receiving State are under order from the government to protect the embassy premises of the sending State, but they actually join a mob attack on the embassy, the receiving State is still responsible for the breach of its obligation to protect the embassy premises. A similar provision is stipulated in Article 9 of the Draft Articles. According to Article 9, conduct carried out in the absence or default of the official authorities shall nevertheless be considered as an act of the State as long as the persons involved in the act are exercising official capacity. For instance, if a police officer who had been given the order to protect the embassy premises turned out to join the mob attack on the embassy premise when he is still wearing his uniform and during his duty period, s, his act will still be attributed to the State.

Furthermore, Article 8 stipulates that a State will be held responsible for the conduct of a person or groups of persons that are directed or controlled by a State. Quite often a mass demonstration targeted at foreign embassy premises is proved to be backed or even intentionally directed by the receiving State. For example, it is said that the two attacks by the demonstrators on the British embassy in the Indonesian capital Jakarta on 16 and 18 September 1963 were supported by the Indonesian government. Similar events happened several times during the Chinese ‘Cultural Revolution’ when the British mission was attacked by officially inspired demonstrators.²⁸

²⁸ Roberts (n 26) para 17.9-17.11, and also 17.16. It is worth noting that the deliberate siege and attack on the UK embassy in Beijing during the Chinese ‘Cultural Revolution’ is quite different from the *Tehran Hostages Case*. In the latter case, the ICJ holds that several general declarations by the Iranian religious leader did not amount to an authorization from the State to undertake the specific operation of invading the seizing the US Embassy. On the contrary, the siege on the British mission premises by the Chinese

Article 10 stipulates that the conduct of an insurrectional movement will be attributed to that State if this movement succeeds in establishing a new government. Indeed, on some occasions when an insurrectional movement tries to control the capital of the State, diplomatic premises are especially vulnerable to various kinds of intrusion during the chaos. For instance, during the coup d'état in Iraqi capital Baghdad in July 1958, the British embassy was stormed by a mob, which resulted in the burning of embassy premises and the loss of embassy property. The British military attaché was also killed during the chaos. After the incident, the newly established military government acknowledged its responsibility for the incidents and accepted the responsibility to make compensation to the British government.²⁹ This case is a vivid example of the practice of Article 10.

Last but not least, Article 11 of the Draft Articles stipulates that conduct acknowledged and adopted by a State as its own will be considered as an act of that State, even if the original conduct is not attributable to that State. A typical example of this situation is the *Tehran Hostages Case* in which the Iranian government actually approved the seizure and continuing occupation of the US embassy premises by the attackers.³⁰ Indeed, the ICJ pointed out that there is no evidence that the original attack and occupation of the US embassy premises was officially authorised by the Iranian government. Therefore, the initial attack 'cannot be considered as in itself imputable to the Iranian State', though Iran is still held responsible for its omission 'to take appropriate steps to ensure the protection' of the US embassy premises, diplomatic

demonstrators was almost officially endorsed, immediately after the Chinese government sent an ultimatum to the British government. See *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 59.

²⁹ Roberts (n 26) para 17.1-6.

³⁰ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 73-74.

personnel and property.³¹ Nevertheless, the official governmental approval and endorsement of the situation by the Iranian religious leader, Ayatollah Khomeini, is the key that finally gives rise to the direct responsibility of the Iranian government.³² The ICJ, upon finding enough evidence showing the official stance of the Iranian government, held that:

The policy thus announced by the Ayatollah Khomeini of maintaining the occupation of the Embassy and the detention of its inmates as hostages ... was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation ... The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and the detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.³³

As a result, the Court decided that the Iranian government was responsible for the breaches of its international obligations under various articles of the VCDR.³⁴

³¹ Ibid para 59-61.

³² It is worth noting that the essential factor to decide whether the State indeed ‘acknowledges and adopts’ a conduct as its own lies in whether the State shows its ‘intention to accept responsibility for otherwise non attributable conduct’. See Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (n 7) 123.

³³ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 74.

³⁴ Ibid para 95. See also O de Friuville, ‘Attribution of Conduct to the State: Private Individuals’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 274.

4.2 Defences that Preclude Wrongfulness of conduct of a Receiving State from the Breach of the International Obligations of Diplomatic Inviolability

The above section has discussed the normal situations when State responsibility arises from a breach of international obligations of diplomatic inviolability if such a breach can be attributed to that State. However, it is possible that in some situations, the wrongfulness of the conduct of a State may be precluded due to various valid defences. Accordingly, no State responsibility will arise as long as the defences are validly established. These situations involve various types of defences under the title 'circumstances precluding wrongfulness' in the Draft Articles. In the following subsections, the six different types of possible defences expressly stipulated in the Draft Articles will be analysed. Attention will be paid to the practical application of these defences within the context of the breach of the international obligations of the principle of diplomatic inviolability. It will be revealed that not all types of defences are actually applicable in this context.

4.2.1 Consent from the sending State

The first valid defence that stipulated in the Draft Articles is the consent by the injured State. Article 20 of the Draft Articles prescribes that:

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

One typical circumstance in the context of the breach of the international obligations of the principle of diplomatic inviolability is, when the receiving State has evidence to suspect misuse of a diplomatic bag, upon receiving express consent from the sending State, the diplomatic bag could be opened in the presence of a diplomatic agent of the sending State. In this circumstance, the receiving State will not be held responsible for the breach of the inviolability of the diplomatic bag under Article 27.3 of the VCDR. Similarly, a receiving State will not be held responsible for the breach of the

inviolability of the embassy premises if the sending State has given its consent to the authorities of the receiving State entering the premises.³⁵

An important practical concern which is unclear from the wording of Article 20 is whether the consent is required always to be express. Crawford contends that consent must be ‘clearly established’ and ‘actually expressed’ by the State, but he acknowledges that this ‘does not prevent consent from being tacit or implicit rather than communicated in some formal way’. The key to distinguishing tacit or implicit consent from presumed consent lies in the perception of the acting State, that is, whether the State believes in good faith that the other State has consented.³⁶ The Commentary on the Draft Articles suggests that the consent may be given by a State in advance or even as the issue it is occurring.³⁷ This is especially conceivable in cases where the head of mission requested local policemen or fire fighters to enter the mission premises to carry out their duties. The Commentary also points out that ‘consent given after the conduct has occurred’ will be deemed as ‘a form of waiver or acquiescence’, which, according to Article 45, leads to the loss of the right for the injured State to invoke responsibility. However, this kind of circumstance is relatively rare in the context of the breach of the international obligations of the principle of diplomatic inviolability.

4.2.2 Self-Defence

The second possible defence stipulated in the Draft Articles is self-defence. According to Article 21:

³⁵ As a matter of fact, Article 22.1 of the VCDR expressly mentions such a circumstance. With the consent of the head of the mission, the officials of the receiving State can enter the premises without giving rise to the State responsibility of the receiving State. Obviously, the consent from the head of the mission can be regarded as ‘valid’.

³⁶ Crawford, *State Responsibility: The General Part* (n 24) 284-285.

³⁷ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 7) 163.

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Based on the text of Article 21, it can be concluded that the invocation of the right of self-defence as a valid defence to preclude the wrongfulness of an act of a State seemed to be strictly limited to the scope of the application of the right of self-defence stipulated under Article 51 of the UN Charter. The conditions for invoking the right of self-defence under Article 51 of the UN Charter is summarised by Greenwood as follows:

- (i) it must be a response to an armed attack;
- (ii) the use of force, and the degree of force used, must be necessary and proportionate;
- (iii) it must be reported to the Security Council and must cease when the Security Council has taken 'measures necessary to maintain international peace and security'.³⁸

It is worth mentioning that Article 51 of the UN Charter does not provide a clear definition of the term 'armed attack'. According to one commentator, the term 'armed attack' can loosely be construed to denote 'threat or use of force' or 'threats to the peace', though such a reference is far from precise.³⁹ Inevitably, the application of the right of self-defence as a valid defence to preclude wrongfulness of an otherwise clear breach of an international obligation of a State leads to controversy.⁴⁰

One infamous case occurred in 1984 when a policewoman was killed by shots fired from the diplomatic premises of Libyan embassy in London.⁴¹ Obviously, in that

³⁸ See C Greenwood, 'Self-Defence' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol IX, 103, para 8.

³⁹ Ibid para 10.

⁴⁰ For a detailed discussion on the controversy of the application of the right of self-defence, see Chapter 5.

⁴¹ See '1984: Libyan Embassy Shots Kill Policewoman' (*BBC News*)

specific case, whether such a firing constituted an armed attack on UK was the key to determine whether the UK could invoke its right of self-defence to overwhelm the inviolability of the Libyan embassy premises. In the 'First Report from the Foreign Affairs Committee', the firing of the weapon was not regarded as an armed attack and the right of self-defence was, accordingly, deemed inapplicable.⁴² Indeed, whether the right of self-defence can be practically invoked as a valid defence to preclude the wrongfulness of the breach of the international obligations of the principle of diplomatic inviolability is subjected to academic debate and its practical application depends on specific merits of each different case.⁴³

For instance, in the aforementioned 1973 Iraqi embassy in Islamabad incident, one scholar of diplomatic law maintains that the right of self-defence could have been adopted by Pakistan as a response to the threat to its national security.⁴⁴ Nevertheless, whether such a justification falls within the scope of Article 51 of the UN Charter is controversial.⁴⁵ As a result, the invocation of self-defence as a valid defence to preclude wrongfulness of a breach of the international obligation of the principle of diplomatic

<http://news.bbc.co.uk/onthisday/hi/dates/stories/april/27/newsid_2502000/2502565.stm> accessed 26 June 2014.

⁴² See UK House of Commons Foreign Affairs Committee, 'The Abuse of Diplomatic Immunities and Privileges' (1984/85 HC 127), para 93-95.

⁴³ Arguably, under emergency situations such as shots coming from the embassy premises, it is the notion of self-defence under domestic criminal or public law that might entitle the police to overwhelm diplomatic inviolability. However, the examination of domestic law doctrine of self-defence is beyond the scope of this thesis and so, this thesis will be confined to the examination of the application of the right of self-defence in international law (ie, Article 51 of the UN Charter and customary international law).

⁴⁴ Roberts (n 26) para 8.11.

⁴⁵ It is worth noting that contrary to the opinion of the editor of the 6th edition of the *Satow's Guide*, the editor of the earlier edition did not expressly adopt the same justification when he commenting on the same incident. See Gore-Booth (ed), *Satow's Guide to Diplomatic Practice* (5th edn, Longman 1979) para 14.14.

inviolability is relatively rare in State practice, though theoretically such an application is conceivable.⁴⁶

4.2.3 Countermeasures

Article 22 of the Draft Articles stipulates that the wrongfulness of an act of a State may be precluded if the relevant act constitutes a lawful countermeasure against another State. The application of countermeasures is further elaborated in Article 49 to 54 of the Draft Articles, in which Article 50.2 (b) expressly prescribes that

A State taking countermeasures is not relieved from fulfilling its obligations:

(b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

It can be deducted from the above text of Article 50.2 (b) that generally, a receiving State may not be able to invoke countermeasures as a valid defence to preclude the wrongfulness of the breach of its obligations of the principle of diplomatic inviolability. Indeed, any act that amounts to a breach of the obligation of the principle of diplomatic inviolability, such as the search and detention of diplomatic bags in response to a similar breach of the inviolability of diplomatic bags by another State, will generally be deemed as a kind of diplomatic retaliation. Obviously, under Article 50.2 (b), such kind of act will not be deemed lawful, and, as a result, the wrongfulness of this kind of act will not be precluded.

4.2.4 Force majeure

It is well established in domestic law of various nations as well as customary international law that *force majeure* is a valid defence to preclude wrongfulness of an

⁴⁶ The controversies arising from the conflicts between the application of the right of self-defence and the principle of diplomatic inviolability will be further analysed in detail in Chapter 5, section 5.3.

otherwise unlawful act.⁴⁷ This classic defence is reflected in Article 23 of the Draft Articles. According to Article 23, the term '*force majeure*' means:

[T]he occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

It is pointed out by Hentrei and Soley that the practical application of *force majeure* as a valid defence to preclude the breach of an obligation is subjected to three conditions: irresistibility, unpredictability and externality.⁴⁸ First of all, 'irresistibility' means that the specific event that led to the State act which contravenes an international obligation should be brought about by a purely natural cause such as an earthquake, tsunami, or volcano eruption.⁴⁹ Secondly, 'unpredictability' means that in general terms, the specific events that led to the State act which contravenes an international obligation should not normally be foreseeable and indeed beyond the control of that State.⁵⁰ Finally, 'externality' requires that no causal link exists between the situation of force majeure and the acts of the State.⁵¹ In short, as Crawford points out, '[I]t is essentially involuntary.'⁵²

Although cases involving the invocation of *force majeure* as a valid defence of precluding wrongfulness of an act of a State in the context of the breach of the

⁴⁷ S Hentrei and X Soley, 'Force Majeure' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol IV, 151, para 1- 4.

⁴⁸ Ibid para 11.

⁴⁹ Ibid para 12.

⁵⁰ Ibid para 14. See also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 7) 170.

⁵¹ Hentrei and Soley (n 47) para 15. In fact, this condition is expressly stipulated in Article 23.2 (a) of the Draft Articles on State Responsibility.

⁵² Crawford, *State Responsibility: The General Part* (n 24) 295.

international obligations of diplomatic inviolability are relatively rare, there is one situation that the defence of *force majeure* may be practically invoked. During the great earthquake in the capital of Haiti in January 2010, the Taiwan embassy was completely destroyed and the Taiwanese ambassador was seriously injured.⁵³ Under this circumstance, it is conceivable that the local Haitian authorities would enter the embassy premises to rescue the victims without practically obtaining the consent from the ambassador. The wrongfulness of the act of entering into embassy premises for rescue without consent can be precluded in accordance with the conditions to invoke the defence of *force majeure*.

4.2.5 Distress

Similar to *force majeure*, distress is another classic defence that may preclude wrongfulness of an otherwise unlawful act.⁵⁴ Article 24 of the Draft Articles elaborates the circumstance when distress can be invoked as a valid defence to preclude the wrongfulness of a State act:

The wrongfulness of an act of a State ... is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

Obviously, the essential condition to invoke distress as a valid defence to preclude wrongfulness of an otherwise unlawful act of a State lies in the immediate necessity to save someone's life – either the author of the act or other persons entrusted to the author's care.⁵⁵ Distress differs from *force majeure* in that the author of the act has free

⁵³ 'Taiwan Ambassador to Haiti Taken to Hospital, Embassy Destroyed' (*Taiwan News Online*, 13 January 2010) <http://www.etaiwannews.com/etn/news_content.php?id=1154379> accessed 2 July 2013.

⁵⁴ E Fasoli, 'Distress' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol III, 168, para 2- 4.

⁵⁵ The Commentary on the Draft Articles clearly points out that the application of Article 24 is limited to cases where human life is at stake. This is the prerequisite for invoking distress as a valid defence. See Crawford (n 8) 176.

will to decide whether to undertake such an act.⁵⁶ That means, in face of the breach of an international obligation on one hand and the immediate necessity to save someone's life on the other hand, the author intentionally chooses the latter option as a priority on the basis that complying with the specific international obligation 'would almost certainly cause his or her death or that of the persons entrusted to his care'.⁵⁷ This is reflected in the text of Article 24 as 'no other reasonable way' to avoid the consequence, apart from breaching the relevant international obligation. In this regard, the necessity to save human life clearly outweighs the international obligations being breached.

As a matter of fact, the invocation of distress as a valid defence to preclude wrongfulness of an act of the receiving State is not inconceivable in the context of the breach of the international obligations of diplomatic inviolability. For instance, if a diplomatic agent loses his control and is firing a pistol in the street, the local authorities of the receiving State may adopt forcible measures to stop him. That is, to overwhelm the personal inviolability of the diplomatic agent so as to protect the lives of those innocent people in the street from the immediate threat from the diplomatic agent. In ordinary situations, these actions would be deemed as a breach of the personal inviolability of the diplomatic agent under Article 29 of the VCDR. However, it is obvious that in this specific scenario, there is almost no alternative other than adopting forcible measures to stop the diplomatic agent. In accordance with the application of the defence of distress under Article 24 of the Draft Articles, the wrongfulness of the act of the local authorities will be precluded. In fact, the jurisprudence of the ICJ supports such a defence. In the judgement of the *Tehran Hostages Case*, the Court incisively points out that:

The observance of [the principle of diplomatic inviolability] does not mean... that a diplomatic agent caught in the act of committing an assault or other offence may

⁵⁶ Crawford, *State Responsibility: The General Part* (n 24) 301.

⁵⁷ Fasoli (n 54) para 7.

not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime.⁵⁸

Another two typical situations in which distress can be invoked as a valid defence to preclude wrongfulness of a State act that may constitute a breach of the international obligations of the principle of diplomatic inviolability include: stopping a diplomatic agent from drunk driving, or opening a diplomatic bag which carries a human hostage.⁵⁹ However, to acknowledge the possible invocation of distress, the receiving State must establish enough evidence to prove that there is a distress. Practically, this is extremely difficult, and moreover, the condition that ‘there is no other reasonable way to save life’ is not easy to be validated. Therefore, it can be seen from State practice that receiving States rarely invoke distress as a valid defence to the breach of the international obligation of the principle of diplomatic inviolability.

4.2.6 Necessity

The last possible defence to preclude the wrongfulness of an otherwise unlawful act of a State is necessity.⁶⁰ Like *force majeure* and distress, necessity is also a classic defence in customary international law.⁶¹ Whereas the invocation of distress is limited to circumstances to save human life, the invocation of necessity covers issues related to the safeguard of ‘essential interest’. To be specific, Article 25.1 (a) of the Draft Articles on State Responsibility prescribes that necessity can be invoked as a valid defence to preclude the wrongfulness of a State act if the act ‘is the only means for the State to safeguard an essential interest against a grave and imminent peril’.

⁵⁸ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 86.

⁵⁹ Roberts (n 26) para 8.38 for one typical case of this kind which happened in Rome in 1964.

⁶⁰ Here ‘necessity’ is used in a strict sense which refers to the term that stipulated in Article 25 of the Draft Articles on State Responsibility.

⁶¹ A Tanzi, ‘Necessity’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol VII, 583, para 1- 2.

It can be seen from Article 25.1 (a) that the invocation of necessity is subjected to three essential conditions. In the first place, there should be an ‘essential interest’ for the State to protect. The term ‘essential interest’ is not strictly defined in the text of Article 25.1 (a) so it can be suggested that the interpretation of ‘essential interest’ varies from case to case.⁶² Secondly, the essential interest of the State must have been threatened by ‘a grave and imminent peril’. Like the term ‘essential interest’, what can be deemed as ‘grave’ is subject to interpretation in different circumstances.⁶³ Finally, the State act should be ‘the only means’ that the State can feasibly take to protect the essential interest. The term ‘only means’ suggests that necessity may not be invoke ‘if there are other (otherwise lawful) means available, even if they may be more costly or less convenient’.⁶⁴

In addition to Article 25.1 (a), Article 25.1 (b) specifies another condition on the invocation of necessity: the act of the State shall not ‘seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole’. Practically, it can be revealed that in the context of the breach of the international obligations of the principle of diplomatic inviolability, necessity is less frequently invoked as a valid defence by a receiving State to justify its otherwise unlawful act. The reason is quite evident: the principle of diplomatic inviolability itself may be generally regarded as an underlying principle of international community. The ICJ has expressly pointed out in the judgement of the *Tehran Hostages Case* that:

⁶² Ibid para 14.

⁶³ Ibid.

⁶⁴ Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (n 7) 184.

[T]he principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundation of this long-established regime.⁶⁵

Moreover, the Court also pointed out in the same judgement that diplomatic law is a ‘self-contained’ regime,⁶⁶ and so, it can be inferred that the receiving State shall normally not take an action which constitutes a breach of the international obligations of the principle of diplomatic inviolability so as to ‘safeguard an essential interest against a grave and imminent peril’. Obviously, such an act is well beyond the acceptable measures which a receiving State can take within the regime of diplomatic law.

4.3 Legal Consequences from the Breach of the International Obligations of Diplomatic Inviolability

4.3.1 Legal consequences

It has already been pointed out above that breaches of the international obligations of diplomatic inviolability, if there is no valid defence applicable, will ultimately lead to the existence of the international responsibility of the receiving State. Provisions concerning the legal consequences of the breach of the international obligations are provided in Article 28 to 33 of the Draft Articles, among which Articles 29 to 31 are of particular relevance to the principle of diplomatic inviolability.

In the first place, Article 29 of the Draft Articles provides that:

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

⁶⁵ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 86.

⁶⁶ *Ibid.* See also B Simma and D Pulkowski, ‘*Leges Speciales* and Self-Contained Regimes’ in Crawford, Pellet and Olleson (n 34) 150.

Thus, in accordance with Article 29, it can be confirmed that a receiving State has the ‘continued duty’ to perform its obligations of the principle of diplomatic inviolability even if such obligations have previously been or are currently being breached. To be more specific, whatever breach or breaches the receiving State has committed, its obligation of the principle of diplomatic inviolability still exists, and therefore, the receiving State must continue to perform its obligation of diplomatic inviolability. For instance, in the *Tehran Hostages Case*, Iran still had the continued responsibility to perform its obligations of protecting US embassy and diplomatic personnel even though it initially failed to perform such obligations.⁶⁷ Indeed, it was the intentional indifference and its failure to keep performing its obligations of diplomatic inviolability that transformed the initial non-attributable acts into the State acts of Iran, which ultimately gave rise to its responsibility.

Secondly, Article 30 of the Draft Articles requires that a State that is found to be responsible for its internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

The above provision (a) requires that the responsible State must, in the first place, cease committing the internationally wrongful acts in concern.⁶⁸ This provision is especially important to the observance of the principle of diplomatic inviolability by the receiving State. Indeed, the request for the immediate cessation of a continuing breach of the principle of diplomatic inviolability reflects one of the eminent characteristics of

⁶⁷See *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Order) (Request for the Indication of Provisional Measures) [1979] ICJ Rep 7, para 2 (c), (d) and (e).

⁶⁸As Crawford comments, ‘Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct.’ See Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (n 7) 196.

diplomatic inviolability: the inviolable status of the diplomatic personnel, premises and property underlies the very basis of modern international relations. Breaching of such inviolability will not only ruin the relationship between the sending State and receiving State, but also threatens the whole international community. Such heinous acts must be terminated as soon as possible otherwise the very basis of international relations will be greatly undermined. Therefore, it is not unusual to witness in various cases that following the breach of the international obligations of the principle of diplomatic inviolability by the receiving State, the very first request from the sending State is to call for the immediate cessation of the breach. For instance, in the *Tehran Hostages Case*, the ICJ in its initial order for provisional measures required that:

the Government of Iran immediately clear the premises of the United States Embassy, Chancery and Consulate of all persons whose presence is not authorized by the United States Chargé d' Affaires in Iran, and restore the premises to United States control.⁶⁹

It is also worth noting that a similar statement was later reiterated in the Court's final judgement of the case.⁷⁰

In addition to paragraph (a), paragraph (b) of Article 30 provides another obligation for the responsible State. Whereas paragraph (a) emphasizes the urgent necessity to restore the situation back to normal, paragraph (b) emphasizes the necessity for the responsible State to make a 'non-repetition' promise to the injured State. Such necessity actually reflects that the injured State 'has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily', as Crawford points out.⁷¹ Such kind

⁶⁹ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Order) (Request for the Indication of Provisional Measures) [1979] ICJ Rep 7, para 2 (b). See also paragraph 1 (b) and 2 (a) in which the word 'immediately' were used.

⁷⁰ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 95.3 (a).

⁷¹ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 7) 198.

of promise is also commonly seen following the typical breach of the international obligations of the principle of diplomatic inviolability by a receiving State. For instance, following the violent attack on the Chinese embassy in The Hague on 6 July, 2009, the Dutch foreign minister in his official apology expressly mentioned his government's commitment to 'avoid repetition of such incidents in the future'.⁷²

Thirdly, Article 31 provides another important legal consequence from the breach of an international obligation, that is, the requirement for the responsible State to make reparation to the injured State:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

The above paragraph 1 reflects the general principle of international law that 'every violation of an engagement involves an obligation to make reparation', as pointed out at the beginning this chapter.⁷³ The second paragraph further elaborates that the term 'injury' in paragraph 1 may include not only material damage but also moral damage. This stipulation is especially relevant to the violation of the dignity of the diplomatic mission or the personal dignity of a diplomatic agent, as stipulated in Article 22.3 and Article 29 of the VCDR.

4.3.2 Forms of reparation

Whereas Article 31 of the Draft Articles generally stipulates the obligation for the responsible State to make full reparation to the injured State, Articles 34 to 37 provide

⁷² 'Dutch Government Apologizes for Attack on Chinese Embassy', (*Embassy of the People's Republic of China in the Kingdom of the Netherlands Official Website*, 8 July 2009) < <http://nl.china-embassy.org/eng/xwdt/t571992.htm> > accessed 23 June 2014.

⁷³ *Case concerning the Factory At Chorzów (Germany v Poland)* [1928] PCIJ Series A, No. 17, at 29, as cited in Shaw (n 2) 100.

more detailed stipulation on the various specific forms of reparation. According to Article 34 to 37, three forms of reparation may be made separately or in combination by the responsible State: restitution, compensation and satisfaction.

Restitution is defined in Article 35 of the Draft Articles as a commitment to ‘re-establish the situation which existed before the wrongful act was committed’. With regard to the breach of the obligation of the principle of diplomatic inviolability, restitution has frequently been adopted by the receiving State as a typical form of reparation in cases that the normal situation is not difficult to be restored.⁷⁴ For example, the receiving State releases the diplomatic agent who has been unlawfully detained, thus redresses the former breach of the diplomatic agent’s personal inviolability.⁷⁵ Another typical example is that following the attack on embassy premises by demonstrators, the receiving State helps the diplomatic mission to refurbish the building, thus restore the original status of the building.

Compensation is another typical form of reparation adopted by the responsible State when restitution cannot be adopted as an appropriate form of reparation. Basically, compensation means ‘the payment of damages as a remedy for making good the damage caused by a previous violation of an international obligation’.⁷⁶ Its essence is to

⁷⁴ It is worth noting that Article 35 specifies two exceptions to the application of restitution: firstly, when the restitution is not materially possible; secondly, when the restitution involves a burden out of all proportion to the benefit deriving from restitution instead of compensation. Under these two situations, restitution will generally not be adopted. Instead, compensation or satisfaction will be adopted as the preferred form of reparation. For example, if the inviolable diplomatic agent was killed by demonstrators, it is not materially possible to restore the former situation, and the receiving State can only make compensation or apology for the sending State. See ‘Libya Offers Further Apology for U.S. Envoy’s Death’ (*Reuters*, 20 September 2012) < <http://www.reuters.com/article/2012/09/20/us-protests-libya-usa-idUSBRE88J0HT20120920> > accessed 23 June 2014. See also A Tanzi, ‘Restitution’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol VIII, 972, para 14.

⁷⁵ For instance, see ‘Swedish diplomat arrested, released in Iran’ (*CNN*, 10 January 2010) <<http://edition.cnn.com/2010/WORLD/meast/01/10/iran.diplomat.arrested/index.html>> accessed 23 June 2014.

⁷⁶ S Wittich, ‘Compensation’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol II, 499, para 1.

cover ‘financially assessable damage’ caused by the breach of the international obligation.⁷⁷ In fact, it can be seen as ‘the most commonly sought in international practice’.⁷⁸ Compensation as the preferred form of reparation has seen practice in most cases related to the breach of the international obligation of the principle of diplomatic inviolability of the receiving State. For instance, following the demonstration outside the US embassy in Beijing, the Chinese government paid US\$2.8 million to the US government as compensation for the damage of the premises caused by the demonstrators.⁷⁹

Finally, satisfaction can be adopted by the responsible State as a third form of reparation. According to Article 37.1 of the Draft Articles, the responsible State is ‘under an obligation to give satisfaction for the injury ... insofar as it cannot be made good by restitution or compensation’. It is evident through the wording of Article 37.1 that satisfaction is generally used as a complementary form of reparation. The specific forms of satisfaction: acknowledgement of the breach, expression of regret and formal apology are commonly adopted by the government of the receiving State following the breach of the international obligation of the principle of diplomatic inviolability.⁸⁰

⁷⁷ Article 36.2 of the Draft Articles.

⁷⁸ Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (n 7) 218. It has to be pointed out that compensation is not the appropriate form of reparation for non-material damage suffered by the injured State. See Wittich (n 76) para 31, 32 and 49.

⁷⁹ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (3rd edn, OUP 2008) 166. It is worth noting that following the tragic incident of the NATO bombing of the Chinese embassy in Belgrade, the US government paid US\$28 million to the Chinese government as the compensation for the destruction of the embassy premises. See ‘US Agrees Embassy Compensation’ (*BBC News*, 16 December 1999) < <http://news.bbc.co.uk/1/hi/world/asia-pacific/567289.stm> > accessed 24 June 2014.

⁸⁰ For example, see ‘Dutch Government Apologizes for Attack on Chinese Embassy’ (n 72) and ‘Libya Offers Further Apology for U.S. Envoy’s Death’ (n 74).

Chapter 5 Controversies Involve the Principle of Diplomatic Inviolability (I): The Protection of National Security, Public Safety and Human Life

It was noted in the previous two chapters that several controversies exist in connection with the principle of diplomatic inviolability. To be specific, in various scenarios, the application of certain rules of diplomatic inviolability in the VCDR can clash with other norms and doctrines of international law. It can be asserted that whenever such conflict arises, the receiving State will inevitably face a dilemma in which it has to reconcile different international law norms and decide which norm takes precedence. The dilemma can be illustrated in two aspects. On the one hand, the receiving State has an incumbent obligation under the VCDR to respect the principle of diplomatic inviolability so as to conform its conduct to the norms of diplomatic law. On the other hand, it must also take into account other norms of international law and endeavour to refrain itself from breaching its international obligations under other treaties. As a matter of fact, this kind of dilemma not only reflects the practical difficulty in the practice of the principle of diplomatic inviolability ever since the adoption of the VCDR, but also reflects the growing challenges to the long established principle of diplomatic inviolability within the contemporary international law framework.¹

The purpose of this chapter and the next is to examine the controversies in three distinct scenarios: when the principle of diplomatic inviolability clashes with the protection of the national security of the receiving State, when the principle of diplomatic inviolability clashes with the protection of public safety and human life under

¹ See Chapter 2, section 2.2.4.

emergency, and finally, when the principle of diplomatic inviolability clashes with the protection of human rights. The former two scenarios mainly involve the first aspect of inviolability, that is the negative duty of refraining from interference; whereas the third scenario mainly involves the second aspect of inviolability, that is the positive duty to protect. The major task of the present chapter is exposing and analysing the controversies arising from the first two scenarios and examining the relevant rules and doctrines of other norms of international law, wherever applicable, in these scenarios. Particular attention will be paid to the practical difficulties faced by the receiving State. The controversy arising from the third scenario will be discussed in Chapter 6.

5.1 Controversies Between the Principle of Diplomatic Inviolability and the Protection of the National Security of the Receiving State

The first scenario in which controversies will arise is when the principle of diplomatic inviolability clashes with the protection of the national security of the receiving State. This scenario is perhaps the most politically sensitive one from the perspective of the receiving State. This section will examine the concept of ‘national security’ in international law first, and then analyse various situations when the protection of national security of the receiving State conflicts with the principle of diplomatic inviolability. Furthermore, relevant international law norms, especially the right to self-defence and ‘necessity’, will also be discussed.

5.1.1 ‘National Security’ in international law

The term ‘national security’ is derived from ‘security’, an important term in the subject of international relations.² In fact, it has been noted by international relations scholars

² A MacDonald and Hanna Brollowski, ‘Security’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol IX, 72, para 2. ‘Security’ has been loosely referred to ‘a condition of being or feeling secure, that is, safe from harm, danger, anxiety, or apprehension, and the measures necessary to ensure such safety or peace of mind.’ See also ‘Security’ in G Evans and J Newnham, *The Penguin Dictionary of International Relations* (Penguin 1998) 490; N Klein, *Maritime Security and the Law of the Sea* (OUP 2012) 4-6.

that no single definition of ‘security’ exists, and its meaning often changes depending on the context in which it is used.³ This is the same with regard to the concept of ‘national security’, which can be loosely defined as ‘the security interest of discrete States’.⁴ Some scholars also recognise ‘national security’ as the synonym of ‘national interest’, another ambiguous but rubric term in international relations.⁵ Nevertheless, the concept of ‘national security’ (or simply ‘security’) is still essential to State-centred international law, since ‘safeguarding national security is arguably the primary political interest of all States’.⁶

As a matter of fact, the term ‘national security’ has frequently been mentioned in various international documents, though all of these documents fail to provide a clear definition of the term.⁷ For instance, Article 19 of the United Nations Convention on the Law of the Sea 1982⁸ mentions that the right of innocent passage through the territorial sea should not prejudice the security of the coastal State. Here the term ‘security’ can be properly construed as containing the specific meaning of ‘national security’.⁹ Notably, Article 19.2 of the UNCLOS further lists several activities which can be deemed as

³ MacDonald and Brollowski (n 2) para 2.

⁴ Ibid. See also KA Mingst, *Essentials of International Relations* (4th edn, Norton 2008) 244;

⁵ DA Lake, ‘The State and International Relations’ in C Reus-Smit and D Snidal (eds), *The Oxford Handbook of International Relations* (OUP 2010) 46. See also ‘Vital Interest’ in GR Berridge and L Lloyd, *The Palgrave Macmillan Dictionary of Diplomacy* (3rd edn, Palgrave Macmillan 2012) 387; ‘National Interest’ in Evans and Newnham (n 2) 344-346.

⁶ MacDonald and Brollowski (n 2) para 3.

⁷ The term ‘national security’ is also frequently mentioned in domestic law and policy documents. For example, see ‘The National Security Strategy of the United States of America’ (The White House 2002).

⁸ 1833 UNTS 3. Adopted 10 December 1982, entry into force 16 November 1994. Hereafter referred to as ‘UNCLOS’.

⁹ This article is based on Article 14 of the Convention on the Territorial Sea and the Contiguous Zone 1958 (516 UNTS 205, adopted 29 April 1958, entry into force 10 September 1964). See also WM Reisman, ‘The Regime of Straits and National Security: An Appraisal of International Law Making’ (1980) 74 AJIL 48, 54, 65, 76.

‘prejudicial’ to the security of the coastal State, such as the threat or use of force, and spying. Such activities can be identified as prejudicial to the national security of a State. The relevance of these activities to the protection of national security in controversial situations will be further analysed later in this section.

5.1.2 Controversial situations involving the principle of diplomatic inviolability and the protection of national security of the receiving State

The necessity to protect national security and its relevance to the principle of diplomatic inviolability often attracts scholastic concerns for the reason that the VCDR does not provide any express provision on the exception to the principle of diplomatic inviolability.¹⁰ Thus, it is not surprising that controversies often arise in situations when the protection of the national security is claimed by the receiving State as a valid reason to challenge the inviolability enjoyed by the sending State. Here three categories of controversial situations should be noted.

a) Inviolability of mission premises and the protection of national security

The first category of controversial situations regarding the conflict between the principle of diplomatic inviolability and the protection of national security of the receiving State involves the protection of national security of the receiving State against the abuse of the inviolability of the premises of the diplomatic mission. Indeed, the inviolability conferred on the mission premises suggests that the diplomatic mission is at liberty to carry out any sort of activities within mission premises.¹¹ State practice

¹⁰It is noteworthy that neither did the ILC’s Draft Articles on Diplomatic Intercourse and Immunities 1958 provide any exception to the principle of diplomatic inviolability. See ‘Draft Articles on Diplomatic Intercourse and Immunities’, YILC [1958] vol II, 89, 95, 97. See also EL Kerley, ‘Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities’ (1962) 56 AJIL 88, 102-103; G Tunkin, ‘Vienna Convention on Diplomatic Relations’ (1961) 6 International Affairs 51, 54.

¹¹ Just as Wicquefort had commented, ‘[T]he ambassador ought to enjoy in his house so great a liberty that nobody can there control his actions’. See A de Wicquefort, *The Ambassador and His Functions* (first published 1681, J Digby tr, University of Leicester Press 1997) 266. See also M Hardy, *Modern Diplomatic Law* (Manchester University Press 1968) 42.

reveals that, thanks to the absolute inviolability of mission premises stipulated in Article 22 of the VCDR, the diplomatic mission can occasionally make use of its inviolability to cover activities that can be deemed as ‘prejudicial to the national security’ of the receiving State. Arguably, such activities may include but not be limited to: espionage, granting asylum to anti-government activists, aiding anti-government activists or groups as well as other kinds of direct or indirect subversive activities.

As was pointed out in Chapter 3, Article 41.3 of the VCDR expressly stipulates the obligation of the diplomatic mission not to use the mission premises in any way incompatible with its proper functions.¹² According to that provision:

The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State.¹³

Undoubtedly, the abovementioned activities are outside the five proper functions of the diplomatic mission under Article 3 of the VCDR. In essence, these activities are flagrant abuses of the inviolability of the mission premises. With regard to these activities, Denza has incisively commented as follows:

To take the extreme case, the members of the diplomatic mission may not use the premises to plot the removal or the destabilization of the government or the political system of the receiving State.¹⁴

It is also worth noting that the use of the diplomatic mission as a place to plot the removal or the destabilisation of the government of the receiving State may also amount

¹² See Chapter 3, section 3.1.1 (b).

¹³ Article 41.3 of the VCDR.

¹⁴ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (3rd edn, OUP 2008) 470.

to unlawful intervention, which is contrary to the principle of territorial integrity and political independence stated in Article 2.4 of the UN Charter, as well as customary international law.¹⁵

One infamous incident can be served as a vivid illustration of how such kind of abusive activity of the diplomatic mission ultimately gives rise to a clash between the necessity of protecting the national security of the receiving State and securing the inviolability of the mission premises. On 10 February 1973, huge amount of ammunition and guerrilla warfare training equipment were found in the Iraqi embassy in Islamabad, after the forcible entry into the embassy by the Pakistan special police forces.¹⁶ Before the actual entry into the Iraqi embassy, the Iraqi ambassador Hikmat Sulaiman had refused the request for entry from the Pakistani authorities. However, even without securing the consent of the ambassador, the Pakistani authorities proceeded to the forcible entry of the embassy premises, on the grounds that ‘their concern for national security overrode all considerations of diplomatic immunity’.¹⁷

It is true that the activities of providing weapons for the anti-government groups was an abuse of the inviolability of mission premises and was undoubtedly incompatible with normal diplomatic functions. It is also true that the forcible entry into the mission premises without the consent of the ambassador constituted a breach of the inviolability

¹⁵ Article 2.4 of the UN Charter provides that all member States of the UN shall refrain from the threat or use of force against the territorial integrity and political independence of another State. See also Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charters of the United Nations 1970 (UNGA Res 2625(XXV), adopted 24 October 1970). See also R Jennings and A Watts, *Oppenheim's International Law* (9th edn, Longman 1992) 393-400.

¹⁶ S Saeed, ‘Caught! (But What?)’ (*The Friday Times*, 4 March 2011) <<http://www.thefridaytimes.com/04032011/page26.shtml>> accessed 29 Nov 2013. See also I Cameron, ‘First Report of the Foreign Affairs Committee of the House of Commons’ (1985) 34 ICLQ 610, 612, footnote 11.

¹⁷ Ibid. See also LANM Barnhoorn, ‘Diplomatic Law and the Unilateral Remedies’ (1994) 25 Netherland Yearbook of International Law 39, 52-53.

of the mission premises. The issue is, when the receiving State faces such kind of blatant abuse and a direct threat to its national security, whether it is entitled to invoke the protection of its national security as a valid excuse to override the inviolability of the mission premises, as the Pakistani authorities claimed in the above incident? Or must the local authorities stay silent and wait until the weapons are dispatched outside of the embassy premises?

Whereas espionage activities and aiding anti-government activists can be deemed as direct threat to the national security of the receiving State, another typical situation, which can be deemed as an indirect threat to the national security of the receiving State, is also worth noting. This is the situation related to so-called diplomatic asylum. Indeed, it is not uncommon that the absolute inviolability of mission premises naturally makes the embassy a perfect haven for criminals to seek asylum, especially those fugitives who urgently need a place to hide after a failed *coup d'etat*. Like espionage, the grant of diplomatic asylum to anti-government activists can be deemed by the receiving State as potentially prejudicial to its national security. Thus, the receiving State faces the issue of whether it is entitled to override the inviolability of the mission premises when it finds it essential to capture the anti-government fugitive hiding inside the mission premises.

The right of diplomatic asylum has yet to be generally accepted as a customary rule in contemporary international law.¹⁸ Accordingly, if a diplomatic mission provides asylum to an anti-government activist, the asylum may be deemed as outside the proper

¹⁸ P Shah, 'Asylum, Diplomatic' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol I, 713, para 5 and 10. See also CN Ronning, *Diplomatic Asylum: Legal Norms and Political Reality in Latin American Relations* (Martinus Nijhoff 1965), Chapter 1.

function of the diplomatic mission and the mission runs the risk of intervening the internal affairs of the receiving State.¹⁹ Just as the ICJ pointed out in the *Asylum Case*:

A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State.²⁰

Article 41.3 of the VCDR refers to ‘special agreements in force between the sending and the receiving State’. This phrase may be of particular value with regard to the issue of granting diplomatic asylum to anti-government activists in the mission premises. It is generally agreed that the right of diplomatic asylum has been recognised among Latin American countries and so, diplomatic missions of certain Latin American countries may grant diplomatic asylum to those anti-government activists without the challenge

¹⁹ Denza (n 14) 141. See also AP Rubin, ‘Diplomatic Asylum and Fang Lizhi’ (1990) 1 *Diplomacy and Statecraft* 84, 85.

²⁰ *Asylum Case (Columbia v Peru)* [1950] ICJ Rep 266, 274-275.

from the receiving State.²¹ Special bilateral or multilateral agreements concluded between certain States may also establish the right of diplomatic asylum.²²

The above two situations reveal the controversies as well as dilemmas faced by the receiving State. With regard to these issues, international law scholars have different opinions. For instance, Denza concludes that abusive activity inside the mission premises which amount to the breach of the duty imposed by Article 41.3 of the VCDR is 'not in itself sufficient to entitle the receiving State to take measures contrary to the inviolability of the mission premises'.²³ Nevertheless, it is worth noting that by saying 'not in itself sufficient', she suggests that other factors should also be taken into account. In fact, Denza argues that the right of self-defence can be invoked as a valid excuse to override the inviolability of mission premises.²⁴ Hardy also worries that national security might be invoked by the receiving State as an excuse to override the inviolability of mission premises. He contends that such unilateral power of

²¹ Though, in the *Asylum Case*, the ICJ did not recognise Columbia had the right of asylum in this specific case, based on the finding that no consistent practice could be found. See *ibid*, 277. It is also worth noting that the grant of diplomatic asylum to the founder of WikiLeaks, Julian Assange by the Ecuadorian Embassy in London had caused great controversy over the abuse of inviolability of mission premises since June 2012. Even though Ecuador is a Latin American State which does recognise and practice the right of diplomatic asylum, in this incident, the receiving State, the United Kingdom is not a Latin American State and so, the UK government is not bound by the Latin American regional customary rules of recognising diplomatic asylum. In addition, Julian Assange is not involved in anti-government activities against the receiving State (in this case, the UK). Events following Assange's asylum inside the Ecuadorian Embassy suggested that even if the inviolability of mission premises is potentially abused, the authorities of the receiving State prefer to respect the absolute inviolability of mission premises as stipulated in Article 22 of the VCDR. See 'Wikileaks' Julian Assange Seeks Asylum in Ecuador Embassy' (*BBC News*, 20 June 2012) < <http://www.bbc.co.uk/news/uk-18514726> > accessed 26 June 2014. See also M den Heijer, 'Diplomatic Asylum and the Assange Case' (2013) 26 *Leiden Journal of International Law* 399; P Behrens, 'The Law of Diplomatic Asylum: A Contextual Approach' (2014) 35 *Michigan Journal of International Law* 319.

²² For example, see the Convention on Political Asylum (adopted 28 February, amended 26 December 1933).

²³ Denza (n 14) 472.

²⁴ See the analysis in the following section.

determination will greatly undermine the inviolability of mission premises.²⁵ In the *Tehran Hostages Case*, the ICJ also refuted Iran's claim that the US embassy had been used as a centre of espionage and the claim that interference in Iranian internal affairs was a justification of the attack on the US embassy.²⁶ On the other hand, Vattel had asserted that the receiving State should not be deterred by the inviolability of mission premises if such inviolability may cause 'injury and ruin of the State'.²⁷ Similarly, scholars such as Cahier also cast doubt on whether the stipulation of the absolute inviolability of the mission premises is a wise decision in the case of a grave threat to the security of the receiving State.²⁸ The evaluation of these divergent opinions and the feasibility of some of the solutions will be presented in Chapter 7.

b) Inviolability of diplomatic agents and the protection of the national security of the receiving State

The second category involves the protection of national security of the receiving State against the abuse of the inviolability of the diplomatic agents. As the development of diplomatic law witnessed, the involvement of diplomatic agents in activities that potentially threaten the national security of the receiving State is by no means a recent phenomenon. Whenever a diplomatic agent is involved in a conspiracy against the sovereign of the receiving State or commits espionage, the limit to his personal inviolability will be at issue. Some famous cases during the Renaissance and Classical Periods, such as the *Leslie Case* and the *Mendoza Case*,²⁹ the *Gyllenburg incident* and

²⁵ Hardy (n 11) 44.

²⁶ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 81-83.

²⁷ E de Vattel, *The Law of Nations* (CG Fenwick tr, first published 1758, Oceana 1964) 395.

²⁸ P Cahier, 'Vienna Convention on Diplomatic Relations' (1969) 37 *International Conciliation* 3, 21.

²⁹ LS Frey and ML Frey, *The History of Diplomatic Immunity* (Ohio State University Press 1999) 159, 167-169, 174-176. See also Denza (n 14) 257.

the *Cellamare incident*³⁰ all attracted international law scholars to present their remarkable opinions on this kind of issues. For instance, Gentili argued that an ambassador who is a spy and a traitor should not be punished (especially not be put to death) but only be expelled as long as the criminal act (spying, conspiracy against the sovereign) has not been actually proceeded.³¹ It seems that Gentili's proposal is akin to the modern power to declare a diplomatic agent *persona non grata* under Article 9 of the VCDR. On the other hand, Hotman argued that an ambassador could be detained for conspiracy against the sovereign of the receiving State.³² For Grotius, in line with the view of Gentili, an ambassador in this situation ought to be sent back to the sending sovereign, but Grotius also asserted that the ambassador can be detained and questioned and even be put into death for the reason of self-defence of the receiving State.³³ With regard to the same issue, Vattel also agreed that an ambassador who has plotted an intrigue against the receiving State or committed a serious offence against the sovereign of the receiving State can be expelled based on the right of self-defence of the receiving State.³⁴ Vattel also maintained that if an ambassador seriously endangers the national security of the receiving State by acting as an enemy to the State, he can be repressed by force.³⁵ For the same reason, an ambassador is also subject to arrest if the situation

³⁰ Jennings and Watts (n 15) 1074.

³¹ A Gentili, *De Legationibus Libri Tres* (GJ Liang tr, first published 1585, Ocenia 1964) 65, 111-114. Especially note that Gentili asserted that if the actual injury upon the sovereign has been inflicted, then the criminal diplomatic agent is liable for punishment. See also Frey and Frey (n 29) 169.

³² Frey and Frey (n 29) 173-174. See a similar opinion of Wicquefort (n 12) 275.

³³ H Grotius, *De Jure Belli ac Pacis* (JB Scott tr, first published 1625, Ocenia 1964) 444.

³⁴ Vattel (n 27) 378-379.

³⁵ Ibid 379.

requires.³⁶ Like Grotius, Vattel also cited historical cases to maintain that a diplomat may also be put into death if necessity requires so.³⁷

In more modern time, the issue of personal inviolability of a diplomatic agent was discussed during the draft process of the law of diplomatic intercourse and immunities by the League of Nations. The rapporteur, Mr Diena mentioned the possible situation that the personal inviolability of a diplomat agent may not be invoked in case of ‘reprehensible acts committed by him compelling the State to which he is accredited to take defensive and precautionary measures’.³⁸ He admitted that this situation might give rise to controversy.

The same issue was once again debated by the International Law Commission. In relation to the final Draft Articles of 1958, the ILC Commentary mentioned that personal inviolability ‘does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences’.³⁹ However, during the Vienna Conference the proposal by China to include the above proviso to the personal inviolability was rejected. As a result, the text of Article 29 of the VCDR does not expressly specify any exception to the personal inviolability of a diplomatic agent.⁴⁰ That said, the question remains as to whether Article 29 infers the right of self-defence of the receiving State if its national security is endangered by conspiracy or similar activities by the diplomatic agent. Based

³⁶ Ibid 381.

³⁷ Ibid 382.

³⁸ ‘Codification of the International Law Relating to Diplomatic Intercourse and Immunities, Memorandum prepared by the Secretariat’ in YILC [1956] vol II, 137. The origin of this sentence can be found in Article 6 of the Cambridge Draft of the Institute of International Law on Diplomatic Privileges and Immunities.

³⁹ ‘Draft Articles on Diplomatic Intercourse and Immunities’, YILC [1958] vol II, 97.

⁴⁰ Denza (n 14) 258.

on the draft material the answer seems to be affirmative, but such a construction is not free from controversy. Contemporary scholars have different opinions toward this issue. On one hand, there are scholars who propose a conditional inviolability when the national security of the receiving State is threatened. For instance, Jennings and Watts followed Vattel's doctrine and argued that a diplomatic agent who conspires against the receiving State may be arrested, though they recognised that Article 29 of the VCDR does not refer to such an exception.⁴¹ Chatterjee also agrees that the personal inviolability of an diplomatic agent can be compromised if the receiving State finds it necessary to restrain him if he conspires against the receiving State.⁴² On the other hand, Hardy does not recognise any exception to the personal inviolability of the diplomatic agent.⁴³ With regard to the actual State practice, Denza incisively points out that:

in the twentieth century there appears to be no instance where a receiving sovereign relied on self-defence to take measures stronger than expulsion against a diplomat discovered to be actively conspiring against him.⁴⁴

Thus, whether the personal inviolability of a diplomatic agent can be overridden by the necessity to protect national security of the receiving State remain unclear. It is also unclear whether customary international law has ever established specific rules on this issue.⁴⁵

c) Inviolability of diplomatic bag and the protection of the national security of the receiving State

⁴¹ Jennings and Watts (n 15) 1074.

⁴² C Chatterjee, *International Law and Diplomacy* (Routledge 2010) 191. See also CE Wilson, *Diplomatic Privileges and Immunities* (The University of Arizona Press 1967) 63.

⁴³ Hardy (n 11) 51.

⁴⁴ Denza (n 14) 257.

⁴⁵ Cahier (n 28) 25-26.

Finally, the third category involves the protection of the national security of the receiving State against the abuse of the inviolability of the diplomatic property. It seems that the major controversy in this context relates to the inviolability of the diplomatic bag, due to the very fact that the inviolable status of the diplomatic bag tends to be abused by the sending State more frequently than any other kind of diplomatic property.⁴⁶ It is recognised that the nature of the diplomatic bag provides an ideal and convenient way for the sending State to transport or even smuggle weaponry and other contraband into the receiving State. Admittedly, the weapons may be acquired by local anti-government groups to against the government of the receiving State. The aforementioned 1973 Iraqi embassy in Islamabad incident is a vivid illustration of this kind of issue. The great number of weapons found in the Iraqi embassy were alleged to be smuggled into Pakistan by the Iraqi diplomatic mission itself, probably using diplomatic bags.⁴⁷

It should be noted that in customary international law the inviolable status of the diplomatic bag is slightly different from its inviolability as provided in Article 27.3 of the VCDR. In fact, before the adoption of the VCDR, State practice revealed that the receiving State could challenge the content of the diplomatic bag and ask the suspected bag to be returned back to the sending State (the ‘challenge and return’ option).⁴⁸ However, the discussion during the draft process in the ILC and the Vienna Conference resulted in the adoption of the absolute inviolability of the diplomatic bag, since it was believed that ‘the value of the diplomatic bag as a means of free communication for the sending State would be greatly diminished, if not destroyed’, if the inviolability of the

⁴⁶ CM Nelson, “‘Opening’ Pandora’s Box: The Status of the Diplomatic Bag in International Relations’ (1989) 12 *Fordham International Law Journal* 494, 507-510.

⁴⁷ Saeed (n 16) above.

⁴⁸ Denza (n 14) 227; I Roberts (ed), *Satow’s Diplomatic Practice* (6th edn, OUP 2009) para 8.38. See also Nelson (n 46) 502-503.

diplomatic bag were to be conditional.⁴⁹ Following the adoption of the VCDR, the increasing abuse of diplomatic bags caught international attention. For instance, the UK Foreign Affairs Committee's Report commented on the vital issue of whether electronic scanning of diplomatic bags was permitted under Article 27.3 of the VCDR:

The Government, while acknowledging that some other countries disagree, now inclines to the view that scanning is not unlawful under the Convention, which requires only that the bag be not 'opened or detained' and does not accord inviolability in full. It can thus be argued that scanning or other remote examination by equipment or dogs would be compatible with Article 27.⁵⁰

Such an assertion is based on the assumption that electronic scanning cannot actually reveal the content of the diplomatic bag. However, it is conceivable that with the gradual development of technology, the content of the diplomatic bag may in the future be compromised by way of electronic scanning.⁵¹ Undoubtedly, electronic scanning that can reveal the content of a diplomatic bag is 'not compatible with the basic purpose of Article 27'⁵² even though it does not directly contravene the wording of 'shall not be opened or detained'. In the late 1980s, the ILC sought to clarify the issue of electronic scanning of diplomatic bag in a new draft convention on the status of the diplomatic bag. In its Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Courier 1989, Draft Article 28.1 specified the extent of the inviolability of diplomatic bag as follows:

⁴⁹ Tunkin (n 10) 54; Kerley (n 10) 116-117; Nelson (n 46) 506-507. See also JC Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Dartmouth 1996) 90-92. On the contrary, Denza insists that the text of Article 27.3 does not provide the full inviolability of the diplomatic bag. See Denza (n 14) 238.

⁵⁰ UK House of Commons Foreign Affairs Committee, 'The Abuse of Diplomatic Immunities and Privileges' (1984/85 HC 127), para 29.

⁵¹ For an interesting note on the development of technology in this field, see GV McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (Hurst & Company 1989) 158.

⁵² Denza (n 14) 241.

The diplomatic bag...shall be exempt from examination directly or through electronic or other technical devices.

This stipulation is quite significant for the following two reasons. First, it is obvious that a diplomatic bag which contains weapons will inevitably be revealed through electronic scanning by the authorities of the receiving State. The prohibition of the electronic scanning will therefore ensure the full inviolability of the diplomatic bag, which is in accord with Article 27.3 of the VCDR. In fact, through Article 28.1 of the Draft Articles 1989 the inviolable status of the diplomatic bag would have been further enhanced. Secondly, the prohibition of electronic scanning of the diplomatic bag also reflects the general reluctance of the receiving State to adopt such a measure to challenge the content of the diplomatic bag. Denza points out that the reluctance reflects the fear of the receiving State that its own diplomatic bags will be vulnerable to ‘generalised and indiscriminate challenge’.⁵³ Moreover, the commentary to the Draft Articles 1989 noted that:

The view prevailed in the Commission that the inclusion of this phrase was necessary as the evolution of technology had created very sophisticated means of examination which might result in the violation of the confidentiality of the bag, means which furthermore were at the disposal of only the most developed States.⁵⁴

From the above facts, it can be revealed that the inviolability of the diplomatic bag shall generally not be challenged. However, the reality is that the 1989 Draft Articles failed to become an international convention and therefore the significant stipulation of Article 28.1 does not have binding force at all.

One final issue which is worth noting is: if the receiving State manages to secure strong evidence that the diplomatic bag contains weapons which may intend to be used by anti-

⁵³ This is the official point of view of UK. See Denza (n 14) 239.

⁵⁴ YILC [1989] vol II, 43.

government groups, are these authorities entitled to override the inviolability of the diplomatic bag, just as the security forces of Pakistan did in 1973? The only plausible reason to justify the compromise of the inviolability of the diplomatic bag so as to protect the national security of the receiving State is the right of self-defence. Whether the right of self-defence is applicable in this situation will be discussed later in this chapter.

5.2 Controversies between the Principle of Diplomatic Inviolability and the Protection of Public Safety and Human Life in an Emergency

Even though the protection of national security may be the very first concern of the receiving State, it is perhaps the necessity to protect public safety and human life under emergency situations against the principle of inviolability that more frequently puts the authorities of the receiving State in dilemma. Whereas the controversies arising in respect of the necessity to protect national security against the principle of diplomatic inviolability involves the possible abuse of the inviolability by the sending State, in the case of emergency situations when the necessity to protect public safety and human life are confronted with the principle of diplomatic inviolability, both abuse and non-abuse of the inviolability will give rise to the controversy. Hence, this kind of situation is more complicated than the necessity to protect national security.

5.2.1 The relevance of the necessity to protect public safety and human life to the principle of diplomatic inviolability

Although there is no exact definition of ‘public safety’ in international law, the notion has been linked with emergency situations and it is also closely linked to the necessity to protect human life. It is understandable that most emergency situations involve a threat to public safety and may also involve the threat to human life. And so, the necessity to protect public safety and human life can be treated as one integral situation and discussed together. Notably, in the ILC’s original Draft Articles on Diplomatic

Intercourse and Immunities, the special rapporteur Sandström had mentioned ‘...an extreme emergency, in order to eliminate a grave and imminent danger to human life, public health or property...’⁵⁵ It is also worth noting that public safety can be endangered by man-made acts and acts of nature, that is, *force majeure*. For instance, the Commentary to the Harvard Draft Convention mentioned ‘acts of God and force majeure’.⁵⁶ Whatever the exact meaning of public safety, this concept is important to the application of the principle of diplomatic inviolability. In fact, from time to time, the necessity to protect public safety and human life has been proposed as typical exceptions to the principle of diplomatic inviolability.⁵⁷ During the Vienna Conference, the representatives from Mexico proposed that ‘the head of mission shall cooperate with local authorities in case of fire, epidemic or other emergency.’⁵⁸ Though the Mexican proposal does not expressly mention the term ‘exception’, it can be inferred that this proposal requires the diplomatic mission to concede its inviolability under such situations, at least through cooperation. Another proposal was jointly proposed by Ireland and Japan, which suggested that the inviolability of mission premises shall not prevent the receiving State from ‘taking measures essential for the protection of life and property in exceptional circumstances of public emergency and danger’.⁵⁹ These proposals, however, were later withdrawn by their proposers.⁶⁰ And so, Article 22 of the

⁵⁵ Article 12 of the ‘Draft Articles on Diplomatic Intercourse and Immunities’ YILC [1955] vol II, 16. Original text in French. The above English translation is cited in Denza (n 14) 144.

⁵⁶ ‘Harvard Research Draft Convention on Diplomatic Privileges and Immunities’, (1932) 26 AJIL Sup 15, 52.

⁵⁷ Ibid 52-53.

⁵⁸ *United Nations Conference on Diplomatic Intercourse and Immunities: Official Records* (United Nations 1962) vol II, 20..

⁵⁹ Ibid 24. See also *United Nations Conference on Diplomatic Intercourse and Immunities: Official Records* (United Nations 1962) vol I, 135.

⁶⁰ *United Nations Conference on Diplomatic Intercourse and Immunities: Official Records* (United Nations 1962) vol II, 57.

VCDR does not specify any exception to the inviolability of mission premises under emergency situations. Likewise, Article 27.3 does not expressly provide exceptions to the inviolability of diplomatic bags, and Article 29 does not expressly mention any exception to the personal inviolability of diplomatic agents.

5.2.2 Controversial situations involving the principle of diplomatic inviolability and the protection of public safety and human life

Since there is no express stipulation in the VCDR that specifies any exception to the principle of diplomatic inviolability under public emergency, it is conceivable that when the receiving State is under an emergency situation of protecting public safety and human life, it will have to make a judgment on whether the relevant inviolability should be overridden. The following sections will analyse several typical situations.

a) The inviolability of mission premises and the protection of public safety and human life

With regard to the controversy arising in relation to the inviolability of mission premises and the protection of public safety and human life, two distinct kinds of emergency situations should be noted. The first kind of emergency situations involves emergency caused by *force majeure*, such as fire, flood, earthquake, epidemic, and similar situations. Obviously these situations have no connection to the abuse of the inviolability of the mission premises. The second kind of emergency situation involves situations caused by the abuse of the inviolability of mission premises, such as ongoing violence committed inside the mission premises. These two different kinds of situations should be discussed separately.

(i) Emergency situations caused by *force majeure*

Concerning the various emergency situations caused by *force majeure*, it should first be noted that the strict observance of Article 22 of the VCDR requires officials of the receiving State to refrain from entering the mission premises without the consent of the head of the mission, even in emergency when public safety and human life are in great danger. The first controversial issue with regard to the strict application of Article 22 is

the interpretation of the word 'consent'. Since Article 22 does not specify whether the consent can be deemed as including tacit or presumed consent, it may be argued by the receiving State that under a serious emergency situation such as a fierce fire, their officials are entitled enter the mission premises to extinguish the fire so as to prevent further threat to public safety and human life. However, Nahlik contends that such a wide construction of the word 'consent' in Article 22 would inevitably encourage the authorities of the receiving State 'to presume the occurrence of such an exceptional situation'.⁶¹ Hardy also presented a similar argument.⁶² Nevertheless, the denial of the presumed consent may inevitably lead to another controversial issue: if the head of the mission is somehow not able to be contacted, what could the authorities of the receiving State do? Just as Sen pointed out:

In such an emergency, it may be necessary to take immediate action, and if the envoy cannot be contacted with a view to obtaining his permission, much damage and even loss of human life may be caused.⁶³

It is highly possible that during emergency situations such as a fierce fire and catastrophic earthquake, the communication facilities inside the mission premises are damaged, or the head of the mission himself is wounded. In this case, it is unclear whether the authorities of the receiving State should be allowed to enter into the mission premises to save human life including the life of the head of the mission?

Last but not least, if the head of the mission refuses to give consent to entry, what can the authorities do? Should they do nothing and bear the disastrous consequences or should they enter into the mission premises to take action to protect public safety and

⁶¹ SE Nahlik, 'Development of Diplomatic Law: Selected Problems' (1990) 222 *Recueil Des Cours* 187, 275.

⁶² Hardy (n 11) 44.

⁶³ B Sen, *A Diplomat's Handbook of International Law and Practice* (3rd edn, Martinus Nijhoff 1988) 113.

human life? Notably, it has been asserted in the Harvard Draft Convention that in the emergency situation of fire, 'it would be absurd to wait for the consent of a chief of mission in order to obtain entry upon the premises'.⁶⁴ Silva also commented that:

In these cases it would be absurd to wait for the consent of the head of mission and the possibility of a refusal would still be more absurd.⁶⁵

With regard to these controversies, several cases are worth mentioning. The first four of these involved fires in the relevant diplomatic mission. The first case involved a fire inside the Soviet embassy in Ottawa on 1 January 1956. According to the description of the incident, the Soviet diplomatic staff attempted to put out the fire themselves even though the Canadian firemen were ready just outside the embassy. It is reported that it was only after tense negotiations with the Soviet ambassador that the firemen were allowed to enter the mission premises and do their job. When the fire was finally put out after six hours, the embassy building had already been destroyed by the fire.⁶⁶ The second case happened in the US embassy in Moscow on 28 March 1991. In this case, it is reported that four KGB (Soviet security agency) officers posed as firefighters and successfully 'pulled out secure telephones and communications equipment as well as passports and personnel effects of embassy personnel'.⁶⁷ The third case also happened in the US embassy in Moscow in October 2000. This time the US mission staff managed to extinguish the fire 'without help from dozens of firefighters left waiting

⁶⁴ Harvard Draft Convention (n 56) 52.

⁶⁵ GEDNE Silva, *Diplomacy in International Law* (Sijthoff 1972) 96.

⁶⁶ 'Soviet Embassy Fire' (*City of Ottawa*) <<http://ottawa.ca/en/residents/arts-culture-and-community/museums-and-heritage/witness-change-visions-andrews-newton-33>> accessed 26 June 2014.

⁶⁷ 'KGB Snooped During Embassy Fire' (*Los Angeles Times*, 1 May 1991) <http://articles.latimes.com/1991-05-01/news/mn-1029_1_classified-operations> accessed 26 June 2014. A similar incident happened in 1977, see 'The Embassy Moscow Fire of 1977' (*Association for Diplomatic Studies and Training*) <<http://adst.org/2014/08/the-embassy-moscow-fire-of-1977/>> accessed 26 June 2014.

outside the building’.⁶⁸ The fourth case happened in the Israeli embassy in Paris on 23 May 2002. It is reported that the Israeli embassy guards ‘immediately alerted’ the local authorities and the French firefighters rushed to the scene within minutes.⁶⁹ The fifth case involved the catastrophic earthquake happened in Haiti in January 2010. In this case, the Taiwanese ambassador himself was seriously injured during the earthquake and the local rescue team entered into the embassy to carry out the rescue.⁷⁰

From the above five cases it can be seen that State practice varies on different occasions. It can also be seen that use of presumed consent from the head of mission may lead to the compromise of classified mission archives or other sensitive items. That is why in some cases, embassy staff refused the help from the local authorities in spite of the disastrous situation. Furthermore, as Sen points out, presumed consent may also lead to unexpected consequence. For example, the authorities of the receiving State may deliberately create an emergency fire by throwing an incendiary bomb.⁷¹ Thus, as has already been pointed out, the strict application of Article 22 of the VCDR requires that even under emergency situations, express consent from the head of the mission should always be secured.

Finally, it is worth noting that the issue of the possibility of presumed consent from the head of mission in emergency situations has been expressly stipulated in other

⁶⁸ ‘Fire at U.S. Embassy’ (*The Moscow Times*, 17 October 2000) <<http://www.themoscowtimes.com/news/article/fire-at-us-embassy/258076.html>> accessed 26 June 2014.

⁶⁹ ‘Fire Destroys Israeli Embassy in Paris’ (*People’s Daily*, 23 May 2002) <http://english.peopledaily.com.cn/200205/23/eng20020523_96337.shtml> accessed 26 June 2014.

⁷⁰ ‘Taiwan Ambassador to Haiti Taken to Hospital, Embassy Destroyed’ (*Taiwan News Online*, 13 January 2010) <http://www.etaiwannews.com/etn/news_content.php?id=1154379> accessed 26 June 2014.

⁷¹ Sen (n 63) 113.

international conventions. For instance, Article 31.2 of the Vienna Convention on Consular Relations 1963⁷² provides that:

The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

Likewise, the Convention on Special Missions 1969⁷³ further elaborates the same issue. According to Article 25.1:

Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of the special mission or, where appropriate, of the head of the permanent mission.

Whether the provisions in the VCCR and the Convention on Special Missions provide a solution to the controversies in Article 22 of the VCDR is debatable. It must be emphasized that the nature of the inviolability of consular premises and special missions are different. The solution to the controversies that arise in the inviolability of mission premises will be discussed in Chapter 7.

(ii) Emergency situations caused by abuse of the mission premise

Concerning emergency situations caused by abuse of the mission premises, one remarkable case worth noting is the fatal shooting of policewoman Fletcher in St James's Square in London on 17 April 1984. On that day, Fletcher was on duty in St James's Square to maintain order during a peaceful demonstration outside the Libyan People's Bureau (viz, the Libyan embassy). She was killed 'by shots of automatic gunfire from a window' of the Libyan mission premises.⁷⁴ Subsequently the Libyan

⁷² 596 UNTS 261. Adopted 24 April 1963, entered into force 19 March 1967. Hereafter referred to as 'the VCCR'.

⁷³ 1400 UNTS 231. Adopted 8 December 1969, entered into force 21 June 1985.

⁷⁴ McClanahan (n 51) 5. See also 'The Abuse of Diplomatic Immunities and Privileges' (n 50) para 74.

diplomatic mission refused entry of the British police to carry out a search and commence an investigation. The incident was discussed in the UK Foreign Affairs Committee several months later. Particularly, the controversy about whether the inviolability of mission premises can be overridden in emergency situations caused by abuse of the mission premises when public safety and human life are in great danger was discussed. The report drafted by the Committee quoted the argument in Hardy's *Modern Diplomatic Law* in which a similar scenario was depicted:

[I]t would be a manifest abuse, and indeed an instance of outright foolishness, if, in the event of...a man shooting with a rifle from the window of a mission, the local authorities were not able to go in and deal with the matter.⁷⁵

However, for similar reasons to those discussed in the emergency situation caused by *force majeure*, Hardy concluded that:

[E]ven if a mission fails to use its premises in accordance with legitimate purpose, its inviolability must still be respected by the receiving State.⁷⁶

Sir Francis Vallat agreed with Hardy, and he recalled a similar discussion during the Vienna Conference, which concluded that:

[I]t was considered that in the interests of international relations there should really be a protection of embassies, an inviolability of premises, without exception. One of the fears was if specific exceptions were made in the Convention this would give a certain power of appreciation to the receiving State which it was thought might lead to trouble and be undesirable.⁷⁷

⁷⁵ Hardy (n 11) 44; 'The Abuse of Diplomatic Immunities and Privileges' (n 50) para 90.

⁷⁶ Hardy (n 11) 44. This conclusion is similar to Denza's opinion discussed earlier in this chapter. See note 23 above. Similar to Denza, Cameron also points out that the breach of Article 41.1 and 41.3 of the Vienna Convention does not justify the breach of the inviolability of mission premises in Article 22.1. See Cameron (n 16) 612.

⁷⁷ 'The Abuse of Diplomatic Immunities and Privileges' (n 50) para 91.

The report also commented on another controversy: whether the right of self-defence can be invoked against the inviolability of the mission premises in emergency situations when public safety and human life are in great danger. The report examined various opinions from scholars and concluded that the right to self-defence ‘could not have acted as a lawful basis for the forcible entry of the Bureau premises’.⁷⁸ The conclusion of the UK Foreign Affairs Committee was later endorsed by the UK Government’s White Paper.⁷⁹ Nevertheless, the official conclusion of the UK government was not free from controversy. For instance, Mann argued that:

[T]he inviolability of mission’s premises is by no means absolute, but must give way if the mission has allowed such danger to arise in its premises as to provoke the receiving State and take measures reasonably necessary to protect the security of the life and property of the inhabitants. ... It is therefore impossible to agree with the conclusions of the House of Commons Committee, accepted in paragraph 83 of the Government White Paper.⁸⁰

Also, it is worth mentioning the opinion of Denza. Although she admits that the inviolability of mission premises shall not be overridden due to abuse, she acknowledges the justification of the invocation of the right of self-defence as the last result to protect human life.⁸¹ Evidently, some other scholars agree with Denza on this issue.⁸²

⁷⁸ Ibid para 95. See also R Higgins, ‘The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience’ (1985) 79 AJIL 641, 646-647.

⁷⁹ ‘Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to “The Abuse of Diplomatic Immunities and Privileges”’ (1985 Cmnd 9497), para 83 in which the former conclusion in the Report was accepted by the UK government.

⁸⁰ FA Mann, “‘Inviolability’ and other Problems of the Vienna Convention on Diplomatic Relations’ in FA Mann, *Further Studies in International Law* (OUP 1990) 336.

⁸¹ Denza (n 14) 150.

⁸² JS Beaumont, ‘Self-Defence as a Justification for Disregarding Diplomatic Immunity’ (1991) 29 Canadian Yearbook of International Law 391, 398.

The controversy of the applicability of the right of self-defence will be analysed later in this chapter.

b) The inviolability of diplomatic agent and the protection of public safety and human life

While the inviolability of mission premises is controversial under emergency situations caused both by *force majeure* and by abuse of the inviolability, it is recognisable that the controversy involving the inviolability of diplomatic agents are mainly connected to the emergency situations caused by abuse. The conduct of diplomatic agents, together with member of their family who enjoy the same degree of inviolability under the VCDR, occasionally gives rise to conflict between the inviolability and the necessity to protect public safety and human life. For instance, when the diplomatic agent is drunk-driving, can he be stopped and arrested by the police?⁸³ Or when a diplomatic agent loses control and assaults someone, can the police use force to suppress him on the spot and arrest him?⁸⁴

As it has been discussed earlier, Article 29 of the VCDR does not expressly mention any exception to the personal inviolability of the diplomatic agent. Indeed, Article 41.1 of the Convention states that the duty of the diplomatic agents to respect the laws and regulations of the receiving State is ‘without prejudice to their privileges and immunities’. Thus, the major controversy unsurprisingly lies in whether the personal inviolability of the diplomatic agent can be overwhelmed when the diplomatic agent is undertaking an act which is deemed threatening to public safety or human life.

⁸³ According to the UK Foreign and Commonwealth Office, in 2012 there were 6 cases involving diplomatic agents driving under the influence of drink. See ‘Russian Diplomats With Immunity Accused Of Drunk Driving In Britain’ (*The Huffington Post UK*, 11 July 2013) < http://www.huffingtonpost.co.uk/2013/07/11/russians-drunk-driving-diplomatic-immunity_n_3578738.html > accessed 29 June 2014. See also R Hatano, ‘Traffic Accidents and Diplomatic Immunity’ (1968) 12 *Japanese Annual of International Law* 20, as cited in Nahlik (n 61) 335.

⁸⁴ Two such cases were recorded in 2012 in UK. See the cases cited in n 83 above.

To begin with, it is worth noting that many classical writers discussed the same issue hundreds years ago. They mostly focused on invocation of the right of self-defence, which is deemed as self-evident in the traditional doctrine of the natural law. For example, Grotius pointed out the possibility of overwhelming the inviolability of the diplomatic agent based on ‘natural defence’. He argued:

[A]ll human laws have been so adjusted that in case of dire necessity they are not binding; and so the same rule will hold in regard to the law of the inviolability of ambassadors. ... Therefore that an immediately threatening peril may be met, if there is no other proper recourse, ambassadors can be detained and questioned.⁸⁵

Indeed, considering the criteria mentioned above, it can be seen that the criteria of ‘natural defence’ pointed out by Grotius are similar to the concept of self-defence in contemporary international law. Bynkershoek agreed with the opinion of Grotius. He commented that:

[W]hether an ambassador who initiates violence cannot be repelled with violence...whether he acts...privately by assaulting or killing our citizens or something of the sort. Whosoever uses force, him it has always been permissible to repel by force, nor is there any exception in the case of ambassadors.⁸⁶

Wicquefort also presented a similar opinion in favour of the natural right of ‘necessary defence’:

It is moreover certain that the ambassador is not inviolable when he commits a violence, because in that case the *Law of Nature* is preferable to the *Law of Nations*: though even then care should be taken to keep within the bounds of a lawful and necessary defence; that is to say, rather to oppose such violence than offer any.⁸⁷

⁸⁵ Grotius (n 33) 444.

⁸⁶ C van Bynkershoek, *De Foro Legatorum* (GJ Liang tr, first published 1721, Oceana Publications 1964) 89.

⁸⁷ Wicquefort (n 11) 279.

Vattel, based on his reasoning from the law of nature, apparently agreed with the above arguments.⁸⁸ To sum up, it is quite obvious that the classical writers all agreed that it is necessary for the receiving State to overwhelm the personal inviolability of the diplomatic agent if his conduct is deemed as threatening the public safety and human life.

As has already been pointed out, in the Commentary to the Draft Articles produced by the ILC, it was mentioned that the personal inviolability of the diplomatic agent ‘does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences’.⁸⁹ During the Vienna Conference, the Chinese delegate once again proposed to include this sentence into the provision of personal inviolability of diplomatic agents. However, the proposal was later rejected without further discussion.⁹⁰ Nevertheless, it is worth noting that the International Court of Justice acknowledges the possibility of the exception to the general rule of the inviolability of the diplomatic agent:

Naturally, the observance of this principle does not mean ... that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime.⁹¹

To what extent do the above mentioned opinion and the statement of the ICJ reflect customary international law? Does customary international law does recognise the right of the receiving State to overwhelm the personal inviolability of the diplomatic agent in

⁸⁸ Vattel (n 27) 381.

⁸⁹ ‘Draft Articles on Diplomatic Intercourse and Immunities’, YILC [1958] vol II, 97.

⁹⁰ *United Nations Conference on Diplomatic Intercourse and Immunities: Official Records* (United Nations 1962) vol I, 160.

⁹¹ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 86.

emergency situations when public safety and human life are threatened by the conduct of the diplomatic agent? State practice reveals inconsistency with regard to this issue. For instance, the official opinion of the UK holds that ‘it is not correct that when a diplomat violates this duty [under Article 41 of the VCDR] he loses his immunity’,⁹² while the Canadian practice makes clear that the personal inviolability of the diplomatic agent can be temporarily compromised.⁹³ Notably, the German practice seems to be ambiguous and inconsistent.⁹⁴ Also, scholars are divided into those who propose a limited inviolability⁹⁵ and those who have concerns about the possible prejudice of such an approach to the question of inviolability.⁹⁶ Therefore, it seems that the controversy of whether the personal inviolability of the diplomatic agent can be overridden by the necessity to protect public safety and human life is not completely settled.

c) The inviolability of the diplomatic bag and the protection of public safety and human life

Arguably, the controversies that arise from the conflict between the inviolability of the diplomatic bag and the necessity to protect public safety and human life is the most critical one among all controversies related to the practice of diplomatic inviolability.

⁹² ‘The Abuse of Diplomatic Immunities and Privileges’ (n 50) para 42. To be more specific, the UK practice shows that the preferred method is to request the waiver of criminal immunity of the diplomatic agent, or request its withdrawal from post, rather than directly breach his personal inviolability. See ‘Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to “The Abuse of Diplomatic Immunities and Privileges”’ (n 79) para 63.

⁹³ Denza (n 14) 268.

⁹⁴ Ibid. See also W Bolewski, ‘Diplomatic Privileges in Practice’ (2004) 78 Australian Law Journal 788, 792.

⁹⁵ Mann (n 80) 335; Denza (n 14) 267; Beaumont (n 82) 398; Cahier (n 28) 25-26; Chatterjee (n 42) 191; Silva (n 65) 93, Sen (n 63) 109.

⁹⁶ Hardy (n 11) 51; J Brown, ‘Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations’ (1988) 37 ICLQ 53, 87; CJ Lewis, *State and Diplomatic Immunity* (3rd edn, Lloyd’s of London Press 1990) 135.

To begin with, it is worth noting that Article 27.3 of the VCDR ('the inviolability of the diplomatic bag') is the only provision of all the provisions concerning the principle of diplomatic inviolability that has attracted reservations by State parties to the Convention. A group of Arabic States, including Bahrain, Kuwait, Libya, Saudi Arabia, Qatar and Yemen, have made reservations to the absolute inviolability of the diplomatic bag.⁹⁷ These States tried to stick to the customary international rules of 'challenge and return' of the diplomatic bag if the inviolability of the diplomatic bag is being abused.⁹⁸ These reservations were expressly objected to by several States for the reason that such reservations are 'in clear contravention of the principle of the inviolability of the bag established in Article 27'.⁹⁹ Remarkably, the reservation of Bahrain received a sweeping objection from almost all European States.¹⁰⁰ Nevertheless, the sheer number of the reservations and objections reflect that the absolute inviolability of the diplomatic bag is perhaps the most controversial issue in the VCDR.

Evidently, the controversy of the absolute inviolability in emergency situations to protect public safety and human life is the thorniest issue faced by the receiving State. Several infamous incidents are worth mentioning so as to illustrate this controversy. The

⁹⁷ 'Vienna Convention on Diplomatic Relations, Status as of 25 December 2013' (UNTC) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en#15> accessed 26 June 2014.

⁹⁸ Ibid, especially notable is the reservation made by Qatar which emphasis the nature of the abuse as 'flagrante delicto'. Bahrain uses the phrase 'serious grounds'; Yemen uses 'strong grounds'. The reservation by Saudi Arabia uses the word 'suspect'; Kuwait uses 'believe'. The Libyan reservation straightforwardly mentioned 'not to be bound'. All these reservations reflect that these countries prefer to reserve their own discretion on the diplomatic bag, rather than the vague description in Article 27.4 of the Vienna Convention.

⁹⁹ Nelson (n 46) 506.

¹⁰⁰ The Bahrain reservation states: 'With respect to paragraph 3 of article 27, relating to the 'Diplomatic Bag', the Government of the State of Bahrain reserves its right to open the diplomatic bag if there are serious grounds for presuming that it contains articles the import or export of which is prohibited by law.' It was formally objected by Australia, Belgium, Bulgaria, Canada, Germany, Haiti, Hungary, Japan, Mongolia, the Netherlands, Poland, Russia, Thailand, Ukraine, UK, US, See n 97 above.

type of incident involves abuse of the diplomatic bag in a way that directly or indirectly endangers public safety. On 5 April 1986, a bomb was exploded in *La Belle* discothèque in West Berlin, resulting in 3 deaths and leaving over 200 injured. The explosive which caused the incident was alleged to have been brought into Germany through a diplomatic bag.¹⁰¹ In 2012, the authorities in Bangkok found several undetonated bombs which it was claimed had been smuggled into Thailand through the diplomatic bag.¹⁰² It is also worth mentioning that the weapon which caused the death of WPC Fletcher on 17 April 1984 was believed to be brought into the Libyan People's Bureau through the diplomatic bag.¹⁰³ In these incidents, the abuse of the diplomatic bag were not disclosed when the diplomatic bag passed through Customs in the receiving State. Had the authorities of the receiving State obtained convincing evidence, they would have faced the dilemma of whether or not to challenge the diplomatic bag. If they did, they would have breached the inviolability of the diplomatic bag under Article 27.3 of the VCDR.

The second kind of incidents involves the abduction of human beings using the diplomatic bag. The most notorious example is the Dikko incident.¹⁰⁴ On 5 July 1984, the former Minister of Transportation of Nigeria, Umaru Dikko, was abducted in the streets of London. In the afternoon of the same day, two large crates labelled as normal cargo were sent to Stansted Airport. British Customs officials at the airport noticed that the crates had airholes and they detected a medicinal smell coming from the crates. Since the crates were not labelled as diplomatic bag as per Article 27.4 of the VCDR, the crates were opened by British officials without objection from the Nigerian

¹⁰¹ 'Flashback: The Berlin Disco Bombing' (*BBC News*, 13 November 2001) <<http://news.bbc.co.uk/1/hi/world/europe/1653848.stm>> accessed 25 December 2013.

¹⁰² 'Photos Show Alleged Iran Bombs Hidden in \$27 Radio' (*ABC News*, 21 February 2012) <<http://abcnews.go.com/Blotter/exclusive-photos-show-alleged-iran-bombs-hidden-27/story?id=15759301>> accessed 25 December 2013.

¹⁰³ Barker (n 49) 87.

¹⁰⁴ For other incidents of the same kind, see Roberts (n 48) para 8.39; Denza (n 14) 242-243.

diplomats at the scene. Dikko, who had been drugged and blindfolded, was found unconscious inside one of the crate.¹⁰⁵ In this incident, the British officials challenged and opened the crates since the crates were not diplomatic bags. However, as Nelson points out, if the crate containing Dikko had indeed been properly marked as diplomatic bag according to Article 27.4 of the VCDR, the British officials ‘could not have opened it without violating the VCDR’.¹⁰⁶

The controversy from the abovementioned incidents is quite obvious: when facing manifest abuse of the inviolability of the diplomatic bag and when there is immediate emergency threat to public safety and human life, does the necessity to protect public safety and human life actually override the inviolability of the diplomatic bag?

The controversy was discussed in the UK Foreign Affairs Committee’s Report on the Abuse of Diplomatic Immunities and Privileges. Mr Ivan Lawrence, a member of the Foreign Affairs Committee, noted that:

[H]ad the crate [in the Dikko affair] constituted a diplomatic bag, took fully into account the overriding duty to preserve and protect human life.¹⁰⁷

The Foreign Affairs Committee accepted that the inviolability of the diplomatic bag cannot take precedence over human life.¹⁰⁸ A similar conclusion was later endorsed by the UK government in its White Paper:

¹⁰⁵ ‘The Abuse of Diplomatic Immunities and Privileges’ (n 50) para 106; Denza (n 14) 232-233; Roberts (n 48) para 8.39; Nelson (n 46) 508; Barker (n 49) 4; Nahlik (n 61) 343.

¹⁰⁶ Nelson (n 46) 509.

¹⁰⁷ ‘Copy of A Letter to the Chairman from the Secretary of State for Foreign and Commonwealth Affairs’ in ‘Minutes of Evidence Taken before the Foreign Affairs Committee’ 50, cited in ‘The Abuse of Diplomatic Immunities and Privileges’ (n 50) para 110

¹⁰⁸ ‘The Abuse of Diplomatic Immunities and Privileges’ (n 50) para 110, 127 (7) (v).

[W]here the evidence is good that the contents of a bag might endanger national security or the personal safety of the public or of individuals the Government will not hesitate to take the necessary action on the basis of the overriding right of self-defence or the duty to protect human life.¹⁰⁹

Apparently, most scholars welcome this conclusion.¹¹⁰

Last but not least, it is worth mentioning that the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Courier 1989 keep the absolute inviolability of the diplomatic bag unchanged from Article 27.3 of the VCDR. The Commentary to the 1989 Draft Articles mentioned that some delegates proposed that the absolute status of the inviolability of the diplomatic bag should be changed to the conditional inviolability stipulated in Article 35.3 of the VCCR.¹¹¹ However, the commentary noted:

In the end, and after extensive consideration of the problem, the Commission opted for the present formulation, which maintains the existing regime as contained in the four codification conventions as a compromise solution capable of ensuring better prospects of wide adherence by States to the present articles.¹¹²

¹⁰⁹ ‘Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to “The Abuse of Diplomatic Immunities and Privileges”’ (n 79) para 48.

¹¹⁰ Denza (n 14) 239; Roberts (n 48) para 8.40; Lewis (n 96) 153.

¹¹¹ Article 35.3 of the VCCR reflects the ‘challenge and return’ option in customary international law, which provides:

[I]f the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

See also A Zeidman, ‘Abuse of the Diplomatic Bag: A Proposed Solution’ (1989) 11 *Cardozo Law Review* 427, 434.

¹¹² YILC [1989] vol II, 43-44.

Thus, it can be concluded that the issue of whether the absolute inviolability of the diplomatic bag can be overwhelmed by the necessity to protect public safety and human life remains not completely free from controversy.

5.3 The Right of Self-defence Against the Principle of Diplomatic Inviolability and the Dilemma Faced by the Receiving State

It can be seen from the above discussion that many international law scholars as well as State practice suggests that the absolute inviolability of diplomatic premises, diplomatic agents and diplomatic bags can be subjected to certain limits, especially when the principle of diplomatic inviolability conflicts with the right of self-defence if there is an urgent necessity to protect the national security of the receiving State, or public safety and human life. Indeed, self-defence as a classical doctrine of international law has frequently been mentioned as an ‘inherent’ or ‘overriding’ right of a State¹¹³ and it has also been proposed as a valid excuse to override diplomatic inviolability in certain situations by authorities of diplomatic law such as Grotius, Vattel and, more recently, Denza.¹¹⁴ Besides, it is worth reiterating that theoretically, self-defence can be invoked as a valid defence to exclude the wrongfulness of the breach of the obligations of diplomatic inviolability under the VCDR had the conditions to invoke the right of self-defence been met.¹¹⁵ The issue is, whether the right of self-defence can really be invoked under the three scenarios mentioned above. In order to answer this question correctly, it is necessary to examine the concept of self-defence in contemporary international law first, before proceeding to investigate whether the conditions of the

¹¹³ The first formal acknowledgment of the right of self-defence as an inherent right of a State under international law is Article 51 of the United Nations Charter. See also I Brownlie, ‘The Use of Force in Self-Defence’ (1961) 37 BYIL 183; ‘Self-defence’ in Berridge and Lloyd (n 5) 339.

¹¹⁴ See various citations in the above sections.

¹¹⁵ See Chapter 4, section 4.2.2.

application of the right of self-defence can be met under the abovementioned three scenarios.

5.3.1 The concept and conditions for the application of the right of self-defence in contemporary international law

It is recognised by international law scholars that the modern notion of the right of self-defence in customary international law arose out of the *Caroline Case* in 1837,¹¹⁶ in which the classical statement of the right of self-defence was provided by the US Secretary of State, Daniel Webster as:

A necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation...The act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.¹¹⁷

Based on the above statement, a clear textbook definition of the right of self-defence in customary international law is provided by one scholar as follows:

[The use of force] in response to an immediate and pressing threat, which could not be avoided by alternative measures and if the force used to removed that threat was proportional to the danger posed.¹¹⁸

The conditions for applying the right of self-defence are self-evident from the definition: facing an immediate threat, no alternative measures available, and the principle of proportionality.¹¹⁹ In order to invoke the right of self-defence, all of these three

¹¹⁶ C Greenwood, 'Caroline, The' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol I, 1141, para 5. See also MN Shaw, *International Law* (6th edn, CUP 2008) 1131; M Dixon, *Textbook on International Law* (7th edn, OUP 2013) 327.

¹¹⁷ 'Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline' (1841) 29 British and Foreign State Papers 1126, 1138; as cited in Greenwood (n 116) para 5.

¹¹⁸ Dixon (n 116) 328.

¹¹⁹ These conditions are generally agreed by authorities, though there are some scholars challenge each of these conditions. See C Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 148-156.

conditions should be met. Accordingly, the circumstances in which the right of self-defence can be applied in customary international law are proposed by the same scholar as follows:

1. In response to and directed against an ongoing armed attack against State territory;
2. In anticipation of an armed attack or threat to the State's security, so that a State may strike first, with force, to neutralise an immediate but potential threat to its security;
3. In response to an attack (threat or actual) against State interests, such as territory, nationals, property and rights guaranteed under international law. If any of these attributes of the State are threatened, then the State may use force to protect them;
4. Where the 'attack' does not itself involve measures of armed force, such as economic aggression and propaganda. All that is required is that there is an instant and overwhelming necessity for forceful action.¹²⁰

The above definition and conditions indicate a wide possibility for the application of the right of self-defence in customary international law, although admittedly, some of the points are indeed not free from controversy.¹²¹ By contrast, a much more restrictive application of the right of self-defence is stipulated in Article 51 of the UN Charter, which provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

¹²⁰ Dixon (n 116) 328.

¹²¹ Especially point 3 and 4. See generally, Greenwood (n 116) para 9-10, 41-51.

It can be seen that the right of self-defence under Article 51 of the UN Charter differs significantly from the right of self-defence in customary international law in the following several aspects.

First, while in customary international law the application of the right of self-defence may not have to be confined to the actual existence of an 'armed attack', the UN Charter prescribes the 'armed attack' as a prerequisite to the application of the right of self-defence. Thus, under the UN Charter, the application of the right of self-defence without an actual armed attack is inconceivable, since Article 51 of the UN Charter is the sole source for the application of the right of self-defence, and according to that article the existence of an actual 'armed attack' is obviously indispensable to the invocation of that right.¹²² Notably, Brownlie has commented on Article 51 of the UN Charter that:

[I]t is not incongruous to regard Article 51 as containing the *only* right of self-defence permitted by the Charter. (emphasis added)¹²³

Since 'armed attack' is the key element of the conditions to apply the right of self-defence, the question has been raised as to the exact meaning the term 'armed attack'. In the narrowest sense, an armed attack can be deemed as 'an invasion by the regular armed forces of one State into the territory of another State'.¹²⁴ In addition to this 'paradigm case', there have been several attempts to clarify the meaning of the term 'armed attack' in Article 51 of the UN Charter. For instance, according to US Foreign Relations Committee, the term 'armed attack':

¹²² C Greenwood, 'The ICJ and the Use of Force' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP 1996) 373, 379.

¹²³ I Brownlie, *International Law and the Use of Force by States* (OUP 1963) 271.

¹²⁴ Gray (n 119) 128. It is worth noting that Article 2(4) of the UN Charter uses the term 'threat or use of force' instead of 'armed attack'. Whether this difference suggests that the term 'armed attack' should always be understood in a more narrow sense is subject to debate.

clearly does not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another...However, if a revolution were aided and abetted by an outside power such assistance might possibly be considered an armed attack.¹²⁵

Brownlie further suggests that:

[A] co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a State from which they operate, would constitute an 'armed attack'.¹²⁶

The ICJ in the *Nicaragua Case* provides a similar statement in which the Court points out that an 'armed attack' can be identified as:

the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein.¹²⁷

It is worth noting that the Court expressly rejected the idea that the right of self-defence can be invoked when a State merely provides 'assistance to rebels in the form of the provision of weapons or logistical or other support'.¹²⁸ Dixon further points out that:

Although it is an unlawful use of force to supply rebels in this fashion, apparently this does not amount to an 'armed attack' by the supplier against the threatened State so as to justify the use of force in self-defence.¹²⁹

¹²⁵ As cited in Brownlie (n 123) 278. Though the comment is on the term 'armed attack' as appeared in Article 5 of the North Atlantic Treaty, it can be regarded as the same elaboration of the term in Article 51 of the UN Charter.

¹²⁶ Ibid 279.

¹²⁷ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 195. The statement is actually based on Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX).

¹²⁸ Ibid. See also R Mullerson, 'Self-Defense in the Contemporary World' in LF Damrosch and DJ Scheffer (eds), *Law and Force in the New International Order* (Westview Press 1991) 13, 17.

In addition the existence of an actual armed attack (or activities amounting to an actual armed attack), another distinct difference between the application of the right of self-defence in customary international law and the UN Charter is the possibility that the right of self-defence may be applied in customary international law to protect vital State interests other than the State territory from invasion. Such application may include, but is not limited to the protection of nationals and property abroad, and arguably, the economic interest and other kind of vital interests of a State. As Bowett expressly pointed out in his classical work *Self-Defense in International Law*, the function of self-defence is ‘to justify action otherwise illegal, which is necessary to protect certain essential rights of the State against violation by other States’.¹³⁰ It seems that this wide interpretation is far beyond the scope of application of the right of self-defence in Article 51 of the UN Charter, though there are some scholars advocate such an application.

For instance, with regard to the application of the right of self-defence to protect nationals abroad, Greenwood elaborates that:

the possession of a ‘population’ is one of the requirements of statehood and a case can certainly be made that an attack of sufficient violence upon a substantial number of a State’s nationals, especially where those nationals are selected as victims on account of their nationality and, in particular, where they are attacked in order to harm, or put pressure upon, their State of nationality, is a more serious assault upon the State than some forms of attack upon its territory. Thus the rescue of nationals abroad may well fall within the ambit of the right of self-defence, where the territorial State itself is unable or unwilling to act.¹³¹

¹²⁹ Dixon (n 116) 330. See also RN Gardner, ‘Commentary on the Law of Self-Defense’ in Damrosch and Scheffer, *ibid* 52; J Crawford (ed), *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 748.

¹³⁰ DW Bowett, *Self-Defense in International Law* (Manchester University Press 1958) 270. See generally, Chapter V and VI in Bowett’s book.

¹³¹ Greenwood (n 116) para 24.

Dixon also points out that ‘a number of States argue that aggression can take many forms, not only the classic attack against territory, especially in the modern age’.¹³²

Notwithstanding the differences between the application of the right of self-defence in customary international law and the UN Charter, it is admitted that the customary international law application of the right of self-defence ‘continued to exist alongside the treaty law (ie, the UN Charter)’.¹³³ Just as the ICJ commented on the continuing relevance of the customary international law application of self-defence:

Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter...It cannot, therefore, be held that article 51 is a provision which ‘subsumes and supervenes’ customary international law...The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.¹³⁴

It will be seen in the next section that the dual existence of the right of self-defence under the UN Charter (treaty law) and in customary international law greatly affects the controversy arising in scenarios when the application of the right of self-defence conflicts with the principle of diplomatic inviolability.

5.3.2 The controversies between the application of self-defence and the principle of diplomatic inviolability

The above section has analysed the different circumstances in which the right of self-defence can be invoked and applied under the UN Charter and customary international

¹³² Dixon (n 116) 331. On the contrary, Gray argues that there is no obvious rule in customary law that a State can invoke the right of self-defence to protect its nationals abroad. See Gray (n 119) 156-160.

¹³³ Shaw (n 116) 1132.

¹³⁴ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 176, as cited in *ibid*.

law. How such differences impact on the application of the right of self-defence as a valid excuse to breach the principle of diplomatic inviolability under the aforementioned three distinct scenarios will now be analysed.

First, can the right of self-defence be invoked against the principle of diplomatic inviolability when there is a necessity to protect the national security of the receiving State? Obviously, such application cannot find any basis in the text of Article 51 of the UN Charter. Generally speaking, espionage and subversive activities carried out by the diplomatic mission or diplomatic agents do not involve any kind of direct armed attack as specified in Article 51 of the UN Charter. Besides, such activities generally do not reach 'amount to an actual attack conducted by regular forces' as specified in ICJ's judgement in the *Nicaragua Case* mentioned above. Thus, the right of self-defence cannot be invoked based on treaty law (Article 51 of the UN Charter). In the case of self-defence in customary international law, scholars such as Bowett advocate that the right of self-defence can be invoked to protect vital interest of a State. Arguably, national security can be regarded as such a vital interest. In order to trigger self-defence the situation the receiving State should constitute as immediate threat with no other alternative available or feasible response, and the force used must be proportionate to the threat. In the abovementioned February 1973 Iraqi embassy in Islamabad incident, the Pakistani authority stormed the Iraqi embassy and a large quantity of weapons were found. Even though there was evidence showing that the weapons were intended to be used by the anti-government groups, it is still difficult to conclude the mere storage of weapons can be claimed as constituting an immediate threat to the national security of Pakistan. Moreover, it is difficult to prove that there were no other alternative measures available. In the same incident, the Iraqi ambassador refused to provide his consent for the search of the embassy by the Pakistan police. However, the Pakistan authorities obviously had many alternative measures at hand other than forcible entry of the embassy: they could request the search through formal contact with the Iraqi government; they could deploy police force around the embassy (which will not breach the inviolability of the mission premises) so no weapon can be smuggled out of the embassy. In other cases, for example, the transport of weapons in diplomatic bags, the

claim that such activity would cause immediate threat to the national security is even less plausible. Likewise, there are more alternative measures to cope with threat to the national security from diplomatic agents and diplomatic bags instead of directly breaching their inviolability. For instance, if a diplomatic agent is found spying, he can be declared *persona non grata* under Article 9 of the VCDR. This classic measure is always available to the receiving State so as to put a possible threat to its national security to an end. To sum up, it can be concluded that in the scenario when the protection of national security conflicts with the principle of diplomatic inviolability, it is not convincing to invoke the right of self-defence to overwhelm the principle of diplomatic inviolability. Neither the application of the right of self-defence under treaty law (Article 51 of the UN Charter) nor customary international law provides a valid reason to invoke the right of self-defence in this specific scenario.

The controversy in the application of the right of self-defence against the principle of diplomatic inviolability in the scenario when there is a necessity to protect public safety and human life is a bit more complicated. To begin with, whether the right of self-defence is applicable under Article 51 of the UN Charter in this specific kind of scenario is questionable. As a matter of fact, there is no concrete legal basis to support the argument that Article 51 of the UN Charter endorses the application of the right of self-defence in this kind of scenario. As it has been pointed out above, the jurisprudence of the ICJ in the *Nicaragua Case* illustrates that Article 51 requires an actual attack (or activities amounting to an actual attack) on the territory of a State. Obviously, emergency situations when public safety or human life is endangered will not generally raise the issue of direct attack on the territory of the receiving State. Indeed, it can be seen that in the scenarios that public safety and human life endangered by *force majeure* (usually caused by natural disasters such as earthquake, flood, etc), there is little link between the actual disaster and the diplomatic mission or diplomatic agents. Even in the case of a fire in the diplomatic premises, this has little to do with any actual armed attack on the territory of the receiving State. Even when the emergency situation is caused by the abuse of inviolability by the diplomatic mission or the diplomatic agent, for instance, drunk driving by a diplomatic agent that endangers the public safety and

human life, there is still very little link between the emergency and an armed attack as stipulated in Article 51 of the UN Charter.

The real controversy occurs in relation to the application of the right of self-defence under customary international law. Perhaps, the most problematic situation arises from the situation where weapons are fired onto the street from the diplomatic mission endangering both public safety and human life. This situation is exemplified by the infamous fatal shooting incident happened in St James's Square in London on 17 April 1984.¹³⁵ During the discussion of the incident in the UK Foreign Affairs Committee some scholars raised the issue of the applicability of the right self-defence. For example, Draper pointed out the possible application of the right of self-defence under customary international law against diplomatic inviolability to protect human life from ongoing violence:

Self-defence is an important principle of customary international law, exemplified, but not exhausted, by Article 51 of the UN Charter. From the nature of self-defence it derives from the law of nature from which international law derives its being. It comes into play when act of force are committed by States, although it is not limited to such contingencies. Thus, in the incident of the shooting of Woman Police Officer Fletcher on 17 April, 1984, by an inmate within the Libyan Embassy whose status and identity was unknown, it can properly be contended that, an immediate response, counter-fire might have been directed at the Libyan Embassy windows by the police. Further, in the period immediately after the firing from the embassy, entry might have been carried out by the police, with firearms, if available, and sufficient force used within the embassy to overpower the assailant or any person armed and remove all weapons found inside. Such acts would, in exercise of the right of self-defence, probably have been required immediately after the firing from within or during continued firing.¹³⁶

¹³⁵ See n 74 above.

¹³⁶ 'Memorandum by Colonel Professor GIAD Draper' in 'Appendices to the Minutes of Evidence Taken before the Foreign Affairs Committee' (1984/85 HC 127) 71-72.

Several points can be summarised from Draper's comments. First, the necessity to protect human life in an emergency can find its legal basis in the customary international law of self-defence. Secondly, in an emergency involving shooting from embassy premises, the authorities (in this situation, the police) can invoke the right of self-defence against the inviolability of mission premises (counter-fire and enter the premises to carry out search). Thirdly, provided that the measures adopted are proportional to the threat, and the actions are taken in time (immediately after the firing from the embassy), the conditions for the applying of the right of self-defence under customary international law (not the conditions under Article 51 of the UN Charter) should be considered as fully met.

Notably, several scholars hold the same or similar opinion as Draper's. For example, Sir John Freeland, in reply to the question whether 'self-defence in international law is held to refer only to the self-defence of States against other States rather than individuals', expressly commented that:

I think self-defence not only applies to action taken directly against a State but also to actions directed against nationals of that State.¹³⁷

Freeland further elaborated his appreciation of the application of the right of self-defence to protect human life against diplomatic inviolability:

I certainly would not exclude the possibility of its being justifiable in a case where, for example, there is continued firing of weapons from the premises of an embassy, where every other method has been tried and has failed to stop that, for it then to be lawful to go into the embassy to stop it.¹³⁸

Although Freeland emphasized the conditions of necessity and especially, exhaustion of other possible methods, he argues that applying the right of self-defence can be justified

¹³⁷ 'Examination of Witnesses' in *ibid*, para 47 at 28.

¹³⁸ *Ibid*, para 50.

if ‘there is continued firing of weapons from the premises of an embassy’. His extraordinary example has been criticised by other scholars. For instance, Brown points out that ‘[t]here appears to have been no example of a State exercising such a right of self-defence’.¹³⁹ Higgins is also ‘skeptical as to the applicability at all of the international law concept of self-defense to violent acts by the representatives of one State within the territory of another, directed against the latter’s citizens’.¹⁴⁰ Both Brown and Higgins hold the opinion that even in the above scenario when there is actual shooting coming from the embassy, the right of self-defence cannot be applied.

Similar but not identical to Freeland’s hypothetical scenario of ‘continued firing from the embassy’, Sir Francis Vallat proposed another scenario of emergency:

Suppose the embassy were being used as a kind of fortress for a running battle with people in the street, [the right of self-defence] might then become justifiable, but I find it difficult to imagine that before an international tribunal of repute one would be held to be justified to run into an embassy because there had been one or two shots fired, even if that happened to cause an injury or death.¹⁴¹

Vallat’s contention of such a threshold for testing the conditions of necessity is strongly criticised by Mann. Mann points out that Vallat’s argument:

seems to mean that the authorities have to wait for the death of a third person before they can intervene – a proposition which must be described as wholly unacceptable and unrealistic.¹⁴²

¹³⁹ Brown (n 96) 86.

¹⁴⁰ Higgins (n 78) 647.

¹⁴¹ ‘Examination of Witnesses’ in ‘Appendices to the Minutes of Evidence Taken before the Foreign Affairs Committee’ (n 136) para 78 at 34.

¹⁴² Mann (n 80) 334-335.

Indeed, if what Vallet suggested is unacceptable and unrealistic, what else can be proposed to tackle the whole issue? Mann argued, in contrast with Brown and Higgins, that if public safety or human life is endangered by the abuse of diplomatic inviolability, there is no doubt that the right of self-defence could and should be applied against diplomatic inviolability so as to save life and property. He argued, if ‘a large quantity of explosives is stored in the premises of an embassy and constitute a danger of the utmost gravity to a large, inhabited section of a town’, it would be absurd to wait for the explosion and actual enormous damage occurred before the local authorities take any action to prevent the consequences. Similarly,

[O]nce shots have been fired from an embassy and an undertaking to prevent similar acts has been declined by the diplomat in charge, the receiving State should be entitled to enter the embassy, search it and remove such weapons as may be found.¹⁴³

Mann’s straightforward solution seems to be effective with regard to emergency situations when the abuse of the principle of diplomatic inviolability is extremely obvious, leaving no doubt of the nature of the abuse. Thus, following Mann’s logic, if a diplomatic agent is found shooting weapons on the street, there is no doubt that the local police can overwhelm the diplomatic agent and adopt any necessary force to forestall the threat to the public safety and human life. This logic also seems to conform to the judgement of the ICJ in the *Nicaragua Case*, which expressly recognised the possibility that the inviolability of a diplomatic agent can be overwhelmed and he can even be arrested by the police if he is found committing assault or other offence.¹⁴⁴ However, the vague statement in the ICJ’s judgement does not expressly mention that such a measure is based on the right of self-defence. Neither does the judgement specify what

¹⁴³ Ibid.

¹⁴⁴ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 86.

particular crime can trigger such a measure. What is clear is that the judgement referred to the situation as 'on occasion' and that term suggests that such a situation is rare, and it is not a general rule to overwhelm the inviolability of the diplomatic agent even in this kind of situation.

Mann's logic also suggests that the right of self-defence should be invoked when there is a necessity to protect public safety and human life against the inviolability of the diplomatic bag. In the Dikko incident mentioned above, the crates were not labelled as diplomatic bags so the issue of disregarding the inviolability of the diplomatic bag did not arise. Had the crates been properly labelled as diplomatic bags, the issue whether to open the crates without consent from the Nigerian diplomatic agent based on the right of self-defence to protect human life would be a rather thorny one for consideration. The same issue will arise if there is enough evidence to believe that the diplomatic bag might contain explosive articles. However, the problem of Mann's argument is that often it is not easy and feasible for the authorities to detect the abuse of the diplomatic bag so as to protect public safety and human life. In the Dikko incident, for instance, the evidence of abnormality of the crate (the presence of the air hole, and the moan emitted from the crate) led the authorities to believe that someone was inside the crate. In most occasions, however, the evidence to prove manifest abuse of the diplomatic bag is extremely difficult to obtain without actual breach of the bag's inviolability.

To sum up, it would be too radical for the authorities of the receiving State to disregard the principle of diplomatic inviolability, especially the inviolability of the diplomatic premises, simply based on the imaginary extreme scenarios and deduction from scholars described above. Interestingly, the UK Foreign Affairs Committee in its report concluded that the right of self-defence cannot be adopted to overwhelm the principle of diplomatic inviolability in most kinds of emergency situations and therefore, the inviolability of the diplomatic premises and diplomatic agent, as well as the diplomatic

bag should generally be observed.¹⁴⁵ However, the UK government later in its official response to the Foreign Affairs Committee's Report did recognise the possibility of overwhelming the inviolability of the diplomatic bag based on the right of self-defence so as to protect national security, public safety and human life.¹⁴⁶ The somehow contradictory conclusion suggests that the controversies arising from the application of the right of self-defence against the principle of diplomatic inviolability is far from settled.

In addition to the controversies of the application of the right of self-defence, there are other factors that contribute to the conflict between the principle of the diplomatic inviolability and the protection of national security, public safety and human life. The factors can be seen through the actual dilemma faced by the receiving State in the controversial situations. These factors will be discussed in the following section.

5.3.3 The dilemma faced by the receiving State

It can be revealed from the above analysis that in certain situations when the necessity to protect national security, public safety and human life conflicts with the principle of diplomatic inviolability, the authorities of the receiving State have to decide whether they should consider the protection of certain interests (ie, national security, public safety and human life) as a priority over specific kinds of inviolability. In addition, the controversies arising in the application of the right of self-defence also reveal that it is definitely not easy for the authorities of the receiving State to invoke the right of self-defence to overwhelm the principle of diplomatic inviolability, thanks to the inapplicability of the right of self-defence under Article 51 of the UN Charter, as well as

¹⁴⁵ 'The Abuse of Diplomatic Immunities and Privileges' (n 50) para 95, 97 and 111. The only exception expressly mentioned in the report is the protection of human life, which is considered as a priority over the inviolability of the diplomatic bag.

¹⁴⁶ 'Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to "The Abuse of Diplomatic Immunities and Privileges"' (n 79) para 48.

the uncertainty in the conditions of application of the right of self-defence in customary international law. In a word, in these scenarios, the authorities of the receiving State would inevitably face a dilemma: whether they should keep observing the principle of diplomatic inviolability as stipulated in the VCDR, or disregard the inviolability so as to protect national security, public safety and human life? In essence, should the protection of national security, public safety and human life prevail over the principle of diplomatic inviolability?

Admittedly, such a dilemma is also closely intertwined with the State responsibility of the receiving State. As it has been discussed in Chapter 4, if the receiving State commits an act which breaches its international obligations of the principle of diplomatic inviolability under the VCDR, it shall bear responsibility for the internationally wrongful act unless it can invoke one of the valid defences to preclude the wrongfulness of that act. It has already been pointed out in Chapter 4 that these possible defences are not usually applicable in the context of the breach of the international obligation of the principle of diplomatic inviolability.¹⁴⁷ Evidently, such cases are extremely rare, according to State practice since the adoption of the VCDR. In addition, the seemingly plausible application of the right of self-defence is highly controversial as discussed in the above section. That is to say, as a matter of fact, it is extremely difficult for the authorities of the receiving State to invoke any of the valid defences to preclude the wrongfulness of a breach of the principle of diplomatic inviolability.

It is also worth noting that in contemporary public international law there are no definite rules providing that the protection of national security or the protection of public safety and human life should prevail over the principle of diplomatic inviolability. According to the traditional theory of the hierarchy of norms in international law, only peremptory norms of international law (*jus cogens*) shall prevail over other rules of customary

¹⁴⁷ See Chapter 4, section 4.2.

international law or treaty law.¹⁴⁸ It appears that the protection of national security and the protection of public safety have not been generally considered as peremptory norms.¹⁴⁹ Even though some scholars propose that the right to life is among *jus cogens*,¹⁵⁰ whether the particular protection of human life can be identified as a peremptory norm is far from clear. Therefore, the authorities of the receiving State may not invoke *jus cogens* to validate its breach of the principle of diplomatic inviolability, and the superiority of '*jus cogens*' in the hierarchy of international law provides no easy solution to the dilemma faced by the receiving State.¹⁵¹

Moreover, as it has already been pointed out in Chapter 4, the ICJ in the *Tehran Hostages Case* expressly proposed that the rules of diplomatic law constitutes a 'self-contained regime', and the VCDR has provided within its scheme the 'entirely efficacious' remedy to counter the abuse of the diplomatic agents.¹⁵² Even though in the same paragraph the Court acknowledged the possibility of the 'brief arrest' of the diplomatic agent who is committing a violent offence, it can be asserted that the spirit of the judgement definitely emphasized the significance of the long-established principle of diplomatic inviolability. In short, it seems that the jurisprudence of the ICJ in the *Tehran Hostages Cases* discourages the authorities of the receiving State from

¹⁴⁸ Shaw (n 116) 125; Dixon (n 116) 41.

¹⁴⁹ Actually, the protection of State security and the protection of public safety have never appeared in the proposed listings of peremptory norms (*jus cogens*) in textbooks and monographs of international law.

¹⁵⁰ K Parker, '*Jus Cogens*: Compelling the Law of Human Rights', (1988) 12 *Hastings International and Comparative Law Review* 411, 431. See also A Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 53-60.

¹⁵¹ The proposed solution of the dilemma faced by invoking peremptory norms (*jus cogens*) will be further discussed in Chapter 7.

¹⁵² *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 86.

breaching the principle of diplomatic inviolability so as to deal with the abuse of the inviolability of the diplomatic mission, the diplomatic agents, and the diplomatic bags.

Last but not least, the effect of the principle of reciprocity should not be overlooked. In fact, reciprocity has always been regarded as an important factor for diplomatic decision-making. Just as Simma asserts,

In some areas of international law, dependence of law observance on strict reciprocity of self-restraint is particularly strong, and it is in these areas that reciprocity consequently finds its most direct expression in legal form ... The law of diplomatic privileges and immunities ... furnish many other examples of reciprocity as an indispensable condition for the smooth operation of the law.¹⁵³

To be specific, in the context of the dilemma faced by the authorities of the receiving State, the principle of reciprocity and the possible consequences of their actions may constrain the authorities from overriding the principle of diplomatic inviolability. As Higgins incisively points out,

Virtually every State that is host to a foreign diplomatic mission will have its own diplomats operating abroad, and its own diplomatic bags, embassies and archives, to receive those protections that are provided by international law. Honoring those same obligations vis-a-vis the diplomatic community in one's own country is widely perceived as a major factor in ensuring that there is no erosion of the international law requirements on diplomatic privileges and immunities.¹⁵⁴

Thus, as it has been commented in the Report from the UK Foreign Affairs Committee,

¹⁵³ B Simma, 'Reciprocity' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol VIII, 651, para 8-9.

¹⁵⁴ Higgins (n 78) 641.

In all these matters, of course, considerations of reciprocity will be important. ... [R]eciprocal action may be taken against our diplomats overseas. ... [T]he fear of reciprocal action ... must always weigh in consideration.¹⁵⁵

Obviously, the ‘deterrent effect of reciprocity’ usually makes the authorities of the receiving State refrain from disregarding the principle of diplomatic inviolability in the dilemma of deciding whether the protection of national security, public safety and human life shall prevail over the principle of diplomatic inviolability.¹⁵⁶

To sum up, considering the aforementioned factors, it can be concluded that when facing the dilemma of judging whether the protection of national security, public safety and human life shall prevail over the principle of diplomatic inviolability, the authorities of the receiving State may not easily find a straightforward solution. After analysing of the controversy arising from the protection aspect of the principle of diplomatic inviolability in the next chapter, detailed discussion of the possible solutions to the controversies and dilemma faced by the receiving State will be presented in Chapter 7.

¹⁵⁵ ‘The Abuse of Diplomatic Immunities and Privileges’ (n 50) para 66.

¹⁵⁶ OY Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (OUP 1988) 117, as cited in Barhoorn (n 17) 64.

Chapter 6 Controversies Involve the Principle of Diplomatic Inviolability (II): The Responsibility to Respect Human Rights

Whereas the previous chapter dealt with controversies arising from the first aspect of inviolability, that is, the immunity from any kind of interference and enforcement from the authorities of the receiving State, the primary task of the current chapter is to focus on the controversies arising from second aspect of inviolability, that is, the special duty of protection incumbent on the receiving State. Similar to the discussion in the former chapter, the controversy to be examined in this chapter reflects the conflict between the principle of diplomatic inviolability and other norms of international law. In this case, it is the responsibility to respect essential human rights that brings about the conflict and leads the authorities of the receiving State to another dilemma. The two specific forms of human rights to be discussed in this chapter are the right to demonstrate and the right of expression,¹ thanks to the fact that these forms of human rights are particularly relevant to the protection aspect of the principle of diplomatic inviolability.

Given that the necessity and significance of the protection elements of the principle of diplomatic inviolability were noted in Chapters 1 and 3,² the present chapter will proceed to the examination of two particular scenarios where the protection of diplomatic premises or diplomatic agents conflicts with the respect of essential human

¹ The right to demonstrate, as pointed out later in this chapter, can be recognised as a specific form of the right of assembly (or the freedom of assembly) as stipulated in various international human rights treaties.

² See Chapter 1, sections 1.3.1 and 1.3.3; Chapter 3, sections 3.1.1 (c) and 3.2.1 (c).

rights. To be specific, the first scenario is when the protection of mission premises conflicts with the respect of the right to demonstrate, and the second scenario arises when the protection of the diplomatic agent conflicts with the respect of the right of expression. This chapter will focus on the first scenario and address the following issues in particular: What are the limits to the right to demonstrate? How should we construe the term ‘peace and dignity of the diplomatic mission’ as stipulated in Article 22.2 of the VCDR accurately? How should we understand the phrase ‘all appropriate steps’ as stipulated in Articles 22.2 and 29?

6.1 Controversies between the Protection of Mission Premises and the Respect of the Right to Demonstrate

As a preliminary consideration, it will be appropriate to briefly examine the regime protecting the right to demonstrate in contemporary international law. The right to demonstrate can be properly regarded as one specific form of the right to assembly. According to one authoritative English dictionary, the word ‘assembly’ means ‘a group of people who have gathered together for a particular purpose’.³ Accordingly, the right of assembly has been defined by some scholars as ‘[the right] of persons to gather intentionally and temporarily for a specific purpose’.⁴ According to the dictionary definition, the word ‘demonstrate’ means ‘to march through the streets with a large group of people in order to publically protest about something’,⁵ and so, through analogy, the right to demonstrate may be properly defined as ‘the right that a large

³ ‘Assembly’ in *Longman Dictionary of Contemporary English* (3rd edn, Pearson 2001) 91.

⁴ M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 1993) 373, as cited in S Joseph, J Shultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn, OUP 2004) 568. See also N Weil, ‘Assembly, Freedom of, International Protection’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol I, 678, para 4.

⁵ ‘Demonstrate’ in *Longman Dictionary of Contemporary English* (n 3) 499.

group of people gather together intentionally and temporarily to march through the streets in order to protest’.

Based on the two sets of definitions mentioned above, it is apparent that an organised demonstration can be regarded as a particular form of assembly, though an assembly may also include other outdoor activities such as public meeting, sit-in, picketing, as well as indoor activities.⁶ It can be revealed that the intentional expression of a specific purpose is the key element that distinguishes a demonstration from accidental or disorganised activities by randomly gathered people. In this chapter, the discussion of the right of assembly (referred to as the freedom of assembly in international human rights treaties and some textbooks) only focuses on demonstrations, hence excluding other forms of assembly.

6.1.1 Respect for the right to demonstrate as stipulated in contemporary international law

It is recognised by international law scholars that the right to demonstrate as one specific form of the right to assembly originated during the American and French Revolution in the later eighteenth century.⁷ Nevertheless, it was the establishment of the UN in the 20th century that proved to be a watershed event in the promotion of the right of assembly, along with the emergence development and of other aspects of essential human rights. The first significant international human rights document under the auspice of the UN was the Universal Declaration on Human Rights 1948⁸ which

⁶ Joseph, Shultz and Castan (n 4) 569.

⁷ To be specific, the First Amendment to the US Constitution (1791) expressly mentioned the right of peaceful assembly. See Weiß (n 4) para 2.

⁸ UNGA Res 217A (III), adopted 10 December 1948. Hereafter referred to as the ‘UDHR’. Though technically, the UDHR is not legally binding per se, its legal value as evidence of customary international law has been generally recognised over the seven decades.

expressly mentions that ‘Everyone has the right to freedom of peaceful assembly.’⁹ In the following decades, several international and regional human rights treaties reiterated similar words to those in the UDHR. For example, Article 21 of the International Covenant on Civil and Political Rights 1966¹⁰ provides that ‘The right of peaceful assembly shall be recognised’; the European Convention on Human Rights 1950¹¹, the American Convention on Human Rights 1969¹², the African Charter on Human and Peoples’ Rights 1986¹³ and the Arab Charter on Human Rights 2004¹⁴ all contain similar provisions. These stipulations form the source of the right to demonstrate in contemporary international law, as well as setting the international legal obligations of respecting the right to demonstrate on the States parties to these treaties. Whenever a State party to one of these treaties fails to respect the right to demonstrate of its citizens, it will be liable for the breach of its obligations under that treaty.¹⁵

6.1.2 The limits to the right to demonstrate

Arguably, one of the primary tasks of the law of human rights is to balance rights and duties between individuals and between individuals and States. Thus, in principle, no

⁹ Article 20.1 of the UDHR.

¹⁰ 999 UNTS 171, adopted 16 December 1966, entered into force 23 March 1976. Hereafter referred to as the ‘ICCPR’.

¹¹ ETS No.5, adopted 5 November 1950, entered into force 3 September 1953. Formally known as ‘the Convention for the Protection of Human Rights and Fundamental Freedoms’. Hereafter referred to as the ‘ECHR’.

¹² OAS Treaty Series No.36, adopted 22 November 1969, entered into force 18 July 1978. Hereafter referred to as the ‘ACHR’.

¹³ 1520 UNTS 363, adopted 27 June 1981, entered into force 21 October 1986. Also known as ‘the Banjul Charter on Human and Peoples’ Rights’. Hereafter referred to as the ‘ACPHR’.

¹⁴ Reprinted in 12 International Human Rights Reports 893, adopted 22 May 2004, entered into force 15 March 2008. Hereafter referred to as the ‘Arab Charter’.

¹⁵ UN HRC ‘Communication No 412/1990, *Kivenmaa v Finland*’ (31 March 1994) GAOR 49th Session Supp 40 vol 2, 85.

human rights can be enjoyed without a proper limit. This applies in relation to the right of assembly.¹⁶ Since the right to demonstrate can be regarded as a specific form of the right of assembly, the limits to the right of assembly are also naturally applied to the right to demonstrate. Theory and practice reveal that the right to demonstrate is subjected to the certain limits. Such limits may be traced back to historical documents where the right of assembly first appeared during the late 18th century. For instance, in the French Declaration of the Rights of Man and of the Citizen 1789, it was declared that the manifestation of opinion should not ‘disturb the public order established by law’.¹⁷ In the modern international human rights treaties, similar provisions are also expressly stipulated. A typical example can be seen in Article 21 of the ICCPR which provides that:

[t]he right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or moral or the protection of the rights of and freedoms of others.

Similar provisions also appear in Article 11.2 of the ECHR, Article 15 of the ACHR, Article 11 of the ACPHR and Article 24.7 of the Arab Charter. These stipulations provide a direct reference to the limits imposed on the right of assembly, and accordingly, they also point out the limits on the right to demonstrate.

Several points are worth noting from these provisions. First of all, it should be noted that the prerequisite for the exercise of the right of assembly (as well as the right to demonstrate) is that such an activity must not violate any conditions imposed by relevant laws and regulations. This restriction is exemplified by Article 21 of the

¹⁶ Joseph, Shultz and Castan (n 4) 569. It is expressly asserted by the authors that ‘freedom of assembly is not an absolute right’.

¹⁷ See Article 10 of the Declaration.

ICCPR as mentioned above. With regard to the right to demonstrate, it is not unusual that laws and regulations on public assembly require the organisers of a planned demonstration to notify the authorities in advance. In the decision of the case of *Kivenmaa v Finland*, the UN Human Rights Committee pointed out that a prior notification requirement which has been expressly stipulated by law and regulation is considered compatible with the right of assembly.¹⁸ It is obvious that such requirement is essential to ‘ensuring public order and safety and preventing abuse of the right of assembly’.¹⁹ Secondly, it can be seen directly from the text of Article 21 of the ICCPR that the assembly must be ‘peaceful’. The word ‘peaceful’ here should be construed using its ordinary meaning, which suggest that the assembly should not be violent.²⁰ Though it may be difficult precisely to determine the meaning of the word ‘peaceful’ in theory, it may not be too difficult for authorities such as the police to determine the situation practically, based on common sense and previous experience. For instance, when a demonstration turns into mob violence, such as attacking the police by throwing stones, there is no doubt that such a demonstration can no longer be considered by authorities as ‘peaceful’. Thirdly, it can be seen from Article 21 of the ICCPR that in addition to the relevant laws and regulations which impose preconditions on the right of assembly, certain factors can also be invoked as exceptions to the free exercise of the right of assembly. These factors are the necessity to protect national security, public safety, public order, public health or morals, and the rights and freedom of others. As was pointed out in Chapter 5, there are no single definitions of the terms ‘national security’ and ‘public safety’ in international law. This is the same in relation to ‘public order, public health or morals’. What is clear is that the phrase ‘rights and freedom of others’ includes all other lawful rights and freedom as enumerated in the ICCPR and

¹⁸ *Kivenmaa v Finland*’ (n 15) para 9.2.

¹⁹ Ibid para 7.6.

²⁰ Joseph, Shultz and Castan (n 4) 569.

other human rights documents. The lack of precise definitions of the aforementioned words and phrases inevitably causes controversies under certain scenarios. The scenario of a demonstration held outside a diplomatic mission is one of the most troublesome examples and will be discussed in the following section.

Last, but not least, it is worth pointing out that the significance of the limits to the right to demonstrate is that such limits may provide valid reason for the authorities to suspend an ongoing demonstration without being held responsible for breaching its international obligation of respecting the right of assembly (to be specific, the right to demonstrate) required by international human rights treaties. As will be analysed in the next section, in the specific scenario where a demonstration takes place outside a diplomatic mission, the authorities of the receiving State may be exempted from the responsibility for suspending the right to demonstrate if the ongoing demonstration fails to comply with the conditions mentioned above.

6.1.3 Demonstrations outside diplomatic premises: the difficulties to determine key terms and the dilemma to balance two different norms

The above section briefly summarises the legal regime of the right to demonstrate as one form of the right of assembly in contemporary international human rights law. It is beyond serious argument that a State has the responsibility to respect the right to demonstrate under international human rights treaties. However, a State as a receiving State also has the responsibility to protect mission premises under the regime of diplomatic law. As was noted in Chapter 3, Article 22.2 of the VCDR stipulates the special duty of the receiving State to provide positive protection of the mission premises.²¹ It was also noted in Chapter 4 that Article 22.2 provides one of the sources of the international obligation of the principle of diplomatic inviolability.²² It is worth

²¹ See Chapter 3, section 3.1.1 (c).

²² See Chapter 4, section 4.1.1.

reiterating that failure to observe Article 22.2 without any valid reason would lead to responsibility on the part of the receiving State. As the ICJ asserted in the *Tehran Hostages Case*:

The Iranian Government failed altogether to take any ‘appropriate steps’ to protect the premises...of the United States’ mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion ... For these reasons, the Court ... [d]ecides that the violations of these obligations engage the responsibility of the Islamic Republic of Iran towards the United States of America under international law.²³

Thus, a receiving State may have a dual responsibility simultaneously when a demonstration takes place outside a diplomatic mission. It is in this specific scenario that the regime of international human rights law and diplomatic law conflicts and leads the receiving State to face the dilemma of how to balance the responsibility to respect the right to demonstrate with the responsibility to protect mission premises.

Unsurprisingly, the theoretical and practical difficulties faced by the receiving State have attracted scholarly attention. For example, Denza notes that:

Politically motivated demonstrations in front of foreign embassies have become a highly favoured method of public protest at the policies of the sending State, and with the increasing emphasis in many States on freedom of speech and freedom of assembly they often give rise to difficult decisions as to how the balance between the constitutional rights of citizens of the receiving State and the duty to prevent disturbance of the peace of the mission or impairment of its dignity should be struck by the police or other authorities controlling the demonstration.²⁴

²³ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 63 and 95. A similar assertion was delivered in the *Armed Activities on the Territory of the Congo Case* in 2005. See *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para 342.

²⁴ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (3rd edn, OUP 2008) 169.

It is not difficult to identify from Denza's comments that the crux of the issue lies in how properly to balance between the right to demonstrate on one hand, and the protection of the mission premises on the other. This is probably the key issue leading to the dilemma faced by the receiving State. It can also be identified that the primary role of the authorities of the receiving State in this scenario includes performing two distinct tasks: preventing any disturbance of the peace of the mission and/or impairing the dignity of the mission, and controlling the demonstration.

Not all political motivated demonstration outside a foreign diplomatic mission will give rise to a dilemma for the authorities of the receiving State. As has been discussed in the above section, the two preliminary limits to the right to demonstrate are that the demonstration should be peaceful and comply with relevant laws and regulations. If an ongoing demonstration is apparently violent, it will not be difficult for the authorities to take actions to suspend it, for the reason that a violent demonstration is not protected by international human rights law. In this situation, it is obvious that the authorities of the receiving State should consider the inviolability of the mission premises as a priority, to ensure the special duty of the protection of the mission premises is fulfilled and to prevent the mission premises from intrusion. This situation occurred at the initial stage of the *Tehran Hostages Case* which serves as an example to illustrate what can be deemed as an 'apparently violent' demonstration outside a diplomatic mission. The recent notorious siege of the British embassy in Tehran November 2011²⁵ and the mob attack outside the British embassy in Buenos Aires in April 2012²⁶ are just two other vivid illustrations. In contrast to violent demonstrations, ordinary demonstrations which

²⁵ 'Iranian Protesters Attack British Embassy' (*The New York Times*, 29 November 2011) <<http://www.nytimes.com/2011/11/30/world/middleeast/tehran-protesters-storm-british-embassy.html>> accessed 24 June 2014.

²⁶ 'Falklands Protesters Attack British Embassy in Buenos Aires' (*The Guardian*, 3 April 2012) <<http://www.guardian.co.uk/uk/2012/apr/03/falklands-protesters-attack-british-embassy>> accessed 24 June 2014.

do not involve any violence or insulting activities will not give rise to a dilemma, either. The authorities of the receiving State should respect the right to demonstrate as long as the demonstrators comply with the laws and regulations and do not breach the inviolability of the mission premises.

Thus, apart from the above two ‘easy to determine’ situations, it can be recognised that a politically motivated demonstration will give rise to a dilemma for the authorities of the receiving State if the demonstrators act peacefully but target the ‘peace and dignity’ of the diplomatic mission. Should the authorities of the receiving State suspend a demonstration in favour of the protection of the mission premises, or let the demonstration continue so that the right to demonstrate is exercised?²⁷ Here, two major issues are worth discussing.

First of all, an obvious difficulty concerning a peaceful demonstration outside a diplomatic mission which is targeting the ‘peace and dignity’ of the mission involves making a correct interpretation of the term ‘peace and dignity’ as stipulated in Article 22.2 of the VCDR. As has been pointed out in Chapter 3, neither the text of the VCDR nor the Commentary on the ILC’s Draft Articles 1958 provided any specific reference to the meaning of the term ‘peace and dignity’. The other important terms in the same provision, ‘disturbance’ and ‘impairment’ also lack exact meanings. Dilemmas will arise when demonstrators are waving placards and slogan strips with provocative or even insulting words on them. It is not unusual that demonstrators display flags or posters with anti-foreign head of State text or caricatures on them.²⁸ On some occasions, foreign national flags are burnt overtly in front of the gates of the diplomatic mission.²⁹

²⁷ J d’Aspremont, ‘Premises of Diplomatic Missions’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) vol VIII, 412, para 32.

²⁸ For example, see ‘South African Demonstrators Protest Bush Visit’ (*USA Today*, 9 July 2003) <http://usatoday30.usatoday.com/news/world/2003-07-09-safrica-protests_x.htm> accessed 4 April 2014.

²⁹ For example, see ‘Flag Burned at UK Greek Embassy’ (*BBC News*, 8 December 2008)

With regard to the disturbance of peace of the diplomatic mission, in many cases demonstrators deliberately cause noise outside the mission premises.³⁰ It is worth emphasizing that on many occasions the demonstrators do not behave violently even when they are burning foreign national flags outside the mission premises.³¹ Nevertheless, such peaceful demonstrations may be challenged and protested by the sending State, as they are usually considered as ‘impairment of the dignity’ of the diplomatic mission.³²

To further examine the issue of determining the ‘peace and dignity’ of the diplomatic mission, State practice and notable cases are worth mentioning. The US Congress adopted a resolution as early as 1938 to make unlawful certain activities during a demonstration within five hundred feet of any buildings or premises in its capital without a prior permit by the authorities. These activities include:

[T]o display any flag, banner or placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party or organization, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere

<<http://news.bbc.co.uk/1/hi/uk/7772022.stm>>; ‘100 Protesters Burn American Flag outside U.S. Embassy in London during Minute's Silence for 9/11’ (*Daily Mail*, 12 September 2011) <<http://www.dailymail.co.uk/news/article-2036172/9-11-memorial-events-London-protesters-burn-American-flag-outside-US-embassy.html>>; ‘Protesters Burn US Flags outside Embassy in Tunisia to Protest Prophet Muhammad Film’ (*Fox News*, 12 September 2012) <<http://www.foxnews.com/world/2012/09/12/protesters-burn-us-flags-outside-embassy-in-tunisia-to-protest-prophet-muhammad>> all accessed 24 June 2014.

³⁰ Denza (n 24) 174-175.

³¹ See the news cited in n 28 above. It is reported that the demonstrators ‘marched peacefully’.

³² Denza (n 24) 171 and 175.

with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government.³³

The resolution was later incorporated into a statute of the District of Columbia³⁴ and became legally binding thereafter. A series of US cases involving the interpretation of the above resolution clearly reveals that the key to determine the ‘disturbance of the peace of the diplomatic mission’ lies in whether there is any act or attempt to ‘intimidate, coerce, threaten, or harass’ members of foreign missions, and whether ‘normal embassy activities have been or are about to be disrupted’.³⁵

Similarly, in the UK Foreign Affairs Committee’s Report on the Abuse of Diplomatic Immunities and Privileges, it was pointed out that:

Provided always that work at the mission can continue normally, that there is untrammelled access and egress, and that those within the mission are never in fear that the mission might be damaged or its staff injured, the requirement of Article 22 [of the Vienna Convention on Diplomatic Relations 1961] are met.³⁶

With regard to the ‘dignity’ of the diplomatic mission, it has been commented in the UK case of *R v Roques* that ‘impairment of dignity required abusive or insulting behaviour’ which ‘could only be deduced from specific circumstances’.³⁷ In the Australian case of *Ministry for Foreign Affairs and Trade and others v Magno and another*,³⁸ Judge

³³ Ibid 169.

³⁴ DC Code para 22-1115 (1981).

³⁵ *Boos et al v Barry*, United States Supreme Court (22 March 1988) 485 US 312, as cited in Denza (n 24) 171.

³⁶ UK House of Commons Foreign Affairs Committee, ‘The Abuse of Diplomatic Immunities and Privileges’ (1984/85 HC 127), para 48.

³⁷ Ibid para 50. See also CJ Lewis, *State and Diplomatic Immunity* (3rd edn, Lloyd’s of London Press 1990) 148.

³⁸ 101 ILR 202.

French elaborated what activities may be deemed as ‘impairment of the dignity’ of the diplomatic mission:

The burning of the flag of the sending State or the mock execution of its leader in effigy if committed in the immediate vicinity of the mission could well be construed as attacks on its dignity. So too might the depositing of some offensive substances and perhaps also the dumping of farm commodities outside mission premises.³⁹

Judge French further commented that ‘the notions of peace and dignity in this context involve evaluative judgments and are not amenable to clear rules of definition’.⁴⁰ Thus, it may be concluded that, even though the authorities of the receiving State may decide whether to suspend a demonstration based on their own judgment, the ultimate judgment of whether a demonstration disturbs the peace or impairs the dignity of the diplomatic mission rests in the discretion of the sending State. It can be argued that, a sending State is able to raise a protest if it considers that the authorities of the receiving State did not fulfil the duty of protection under Article 22.2 of the VCDR, even if the authorities of the receiving State did not consider that a demonstration ‘disturbed the peace or impaired the dignity’ of the diplomatic mission of the sending State.

In addition to the obvious difficulty of determining the ‘peace and dignity’ of the diplomatic mission, a second important issue is how to construe the phrase ‘all appropriate steps’?

As has been pointed out earlier in this chapter, a lawful demonstration which is under the protection of international human rights law requires that the demonstration should comply with laws and regulations stipulated by the State. These laws and regulations generally aim to protect national security, public order and morals and other similar

³⁹ As cited in Denza (n 24) 172.

⁴⁰ Ibid.

interests. It has already been pointed out that the term ‘public order and morals’ and similar terms lack accurate definition and thus it is not easy to determine to what extent these terms can practically be applied in various situations. Inevitably, it is the duty of the authorities of the receiving State to undertake the difficult task of determining the limit of the demonstration. Even if the authorities make a judgement, their decision may still be challenged by the sending State who may complain that their mission premises are not sufficiently protected. This difficulty faced by the authorities of the receiving State give rises to two straightforward options which are relevant to the elaboration of the phrase ‘all appropriate steps’. Firstly, since all appropriate steps can be taken to protect the mission, why not make laws and regulations tailored to the specific situation of demonstrations outside foreign diplomatic missions? For instance, to set a cordon outside the mission premises where no demonstration can be held without prior authorisation? Secondly, why not dispatch as many policemen as requested by the diplomatic mission so that the diplomatic mission will not complain? However, two questions are worth considering. First, one must consider whether the abovementioned measures, even the laws and regulations themselves, are acceptable in international human rights law such as Article 21 of the ICCPR? Secondly, should the authorities of the receiving State submit to all the requests from the diplomatic mission of the sending State?

With regard to the first question, it may be argued that not all measures or the laws and regulations can be deemed as immune from challenge on the grounds of international human rights law. Several cases are worth mentioning. In the aforementioned case of *Kivenmaa v Finland*, the actual application of the Finnish Act on Public Meetings was challenged by the Human Rights Committee, even though the Act itself (which has express restrictions on the demonstration and a requirement of prior authorisation) was not deemed as a breach of Article 21 of the ICCPR.⁴¹ In the US case of *Finzer v Barry*,

⁴¹ *Kivenmaa v Finland*’ (n 15) para 9.2, and the dissenting opinion by K Herndl, para 2.8 and 2.9. See

the US Court of Appeals confirmed that the statutory prohibition on the display of signs hostile to the foreign diplomatic mission can be deemed as appropriate, and does not involve a breach of the right to demonstrate.⁴² In the Australian case of *Ministry for Foreign Affairs and Trade and others v Magno and another*, Judge Einfield asserted that relevant regulations concerning the restriction on demonstrations outside foreign diplomatic missions authorised ‘such an interference with basic rights as to balance the scales too far against protesters’ rights and in favour of the rights of those against whom such protests are directed’.⁴³ In the UK case of *R v Commissioner of Police for the Metropolis*, the UK High Court held that it was unlawful for police officers to put police vans in front of protesters as a method to suppress free speech.⁴⁴ On the other hand, in Australia in 2002, the police were authorised to prohibit demonstrations outside a diplomatic mission on the grounds that the demonstrators tried to use instruments used to amplify noise, which may disturb the peace of the diplomatic mission.⁴⁵ From the above cases it can be revealed that there are no uniform criteria to determine what constitutes ‘appropriate steps’. Laws, regulations and measures taken by authorities must be examined in specific cases, and even so, contradictory results are inevitable.

With regard to the second question, it has been already been pointed out in Chapter 3 that the term ‘all appropriate steps’ does not necessarily suggest that the receiving State should submit to all request from the diplomatic mission. Admittedly, if the authorities of the receiving State do submit to all requests from the diplomatic mission, they may

also Joseph, Shultz and Castan (n 4) 572-574.

⁴² 121 ILR 499, as cited in Denza (n 24) 170-171. The relevant statute in this case is the aforementioned DC Code para22-1115 (1981).

⁴³ 101 ILR 202, as cited in ibid 173.

⁴⁴ CO/129/2000, unreported (*The Times*, 20 October 1999) as cited in ibid 174.

⁴⁵ ‘Australian Practice in International Law’ (2002) 23 Australian Yearbook of International Law 289, 351, as cited in ibid 175.

not receive further complaint from the mission. However, it is obviously unreasonable to dispatch a battalion of armed police to protect mission premises when there are only fifty demonstrators waving placards outside the mission premises. It is equally unreasonable to set a cordon five hundred metres away from the mission premises to prevent demonstrators coming close to the mission. If the diplomatic mission makes requests like these two examples, the authorities are not obligation under Article 22.3 of the VCDR to fulfil this kind of request. In essence, it can be concluded that the term ‘all appropriate steps’ requires an obligation on the authorities of the receiving State to make correct judgment in different situations. It does not mean that the authorities of the receiving State should always make legislation or take measures to sacrifice the right to demonstrate in favour of the protection of the mission premises.

Based on the above analysis of the difficulties in determining the meaning of the terms ‘peace and dignity’ and ‘all appropriate steps’, it can be concluded that in the scenario of a demonstration taking place outside a foreign diplomatic mission, the authorities of the receiving State will face the dilemma to balance the responsibility to respect the right to demonstrate and the responsibility to protect mission premises from intrusion and the disturbance of peace or the impairment of the dignity of the mission. The dilemma reflects the conflicts between two different norms of international law: the right to demonstrate under international human rights law, and the inviolability of mission premises under diplomatic law. As with the controversies and dilemmas arising in the conflicts discussed in Chapter 5, it is not convincing to argue that one norm is more important than the other. The protection of mission premises, a core rule of the principle of diplomatic inviolability does not always prevail over the respect of the right to demonstrate, an important rule under international human rights law. Neither does respect for the right to demonstrate always prevail over the protection of mission premises. That said, it is for the receiving State to bear responsibility if it fails to fulfil either of the norms: if it fails to respect the right to demonstrate (as in the case of *Kivenmaa v Finland*), it will be held responsible for the breach of its international obligation under international human rights law; if it fails to protect the mission premises, it will be held responsible for the breach of its international obligation under

diplomatic law (as in the *Tehran Hostages Case*). Although it can be argued that the authorities of the receiving State should make their own judgment correctly in this kind of dilemma (which varies from case to case), an important point that arises here is that it is not always easy to identify whether in a specific situation the right to demonstrate or the protection of mission premises should be deemed as a priority. Thus, in the next chapter, various solutions will be discussed so as to try to lessen the difficulties faced by the receiving State, if not totally settle the dilemma.

6.2 Controversies Arising from the Protection of Diplomatic Agents and the Respect of the Right of Expression

Apart from the controversies that arise in relation to the protection of the diplomatic mission, the controversies that arise from the protection of diplomatic agents should not be overlooked. With regard to the protection of the diplomatic agents, it is the respect of the right of expression that mainly causes conflict and dilemma. In this section, the controversies arising from the protection of diplomatic agents and the respect of the right of expression will be examined. Thanks to the similarity between the controversies arising in this scenario and the scenario discussed in the above section, this section will focus on the distinct issues arising in this scenario.

6.2.1 The respect of the right of expression in contemporary international law

Before the examination of the controversies, it is necessary briefly to summarise the regime governing the right of expression in contemporary international law.⁴⁶ Like the right to demonstrate (as a specific form of the right of assembly), respect for right of expression originated in later eighteenth century.⁴⁷ Since then, it has always been

⁴⁶ The legal regime governing the protection of the diplomatic agents has already been examined in Chapter 3, section 3.2.1 (c).

⁴⁷ See the First Amendment to the US Constitution. See also Article 11 of the French Declaration of the Rights of Man and of the Citizen 1789.

regarded as one of the most significant human rights.⁴⁸ Like the respect of the right to demonstrate, in contemporary international law the respect of the right of expression has been stipulated in various international and regional human rights documents. On the international level, the respect of the right of expression appears in Article 19 of the UDHR and Article 19 of the ICCPR. On the regional level, similar provisions appear in Article 10 of the ECHR, Article 13 of the ACHR, Article 9 of the ACPHR and Article 32 of the Arab Charter.

Also as with the right of assembly, there are certain limits to the exercise of the right of expression. The oldest example can be seen in Article 11 of the French Declaration of the Rights of Man and of the Citizen 1789 where it is expressly mentioned that the person who enjoys this right ‘shall be responsible for such abuses of this freedom as shall be defined by law’. In the ECHR, the proviso is further elaborated:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁴⁹

A similar but simplified version appears later in Article 19.3 of the ICCPR, which states:

The exercise of the rights [of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and necessary:

(a) For respect of the rights or reputations of others;

⁴⁸ J Rehman, *International Human Rights Law* (2nd edn, Longman 2010) 107. See also Joseph, Shultz and Castan (n 4) 517.

⁴⁹ Article 10.2 of the ECHR.

- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Both provisions emphasize the limits of the exercise of the right of expression, in particular, by providing for the respect or protection of the rights or reputation of others. It can be inferred that the abuse of the right of expression, for instance, when an individual insults another individual, that that individual's right of expression will no longer be protected by the relevant provision in an international human rights treaty. This is similar to a demonstration which is not 'peaceful'.

It is also not difficult to identify other similarities between the limits to the right of expression and the right to demonstrate discussed earlier in this chapter. For instance, both enumerate the requirement for compliance with laws and regulations in order to protect other important interests (national security, public order, public health or morals, etc).

6.2.2 Balancing the right of expression and the protection of the dignity of the diplomatic agent: a dilemma faced by the authorities of the receiving State

As was examined in Chapter 3, the receiving State has a special duty of protecting the diplomatic agent, both in terms of his personal safety and his dignity, from any form of attack.⁵⁰ Failing to provide such protection will give rise to State responsibility as discussed in Chapter 4. Since the receiving State also has its international obligation of respecting the right of expression, it will face a dilemma when there is conflict between the respect of the right of expression and the protection of the diplomatic agent, in which case they have to decide which norm should prevail. With regard to the dilemma, three issues are worth considering.

⁵⁰ See Chapter 3, section 3.2.1 (c).

First, it is worth pointing out that when an individual or a group of people breach the basic rule governing the right of expression, such as attacking the person of the diplomatic agent or insulting the diplomatic agent in public, there is no doubt that the authorities of the receiving State should consider the inviolability of the diplomatic agent as a priority. As stipulated in Article 19.3 of the ICCPR, the person who exercises the right of expression also bears the responsibility and special duty not to abuse the right. Actions such as attacking another person's body or insulting another person definitely breach the limits of the right of expression. In that case, his exercise of the right of expression is no longer protected by international human rights law, and consequently, he must be responsible for his action and will probably be arrested and even prosecuted by the receiving State, as stipulated and required in Articles 2 and 3 of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1973.⁵¹ A recent case is worth mentioning. On 27 August 2012, the car of the Japanese ambassador to China was intercepted in Beijing by two private Chinese individuals. The national flag of Japan was torn from the ambassador's vehicle during the incident.⁵² In this case, though the ambassador was physically unhurt, it is beyond serious doubt that his personal dignity was impaired by the attacker. China, the receiving State in this case, took action to punish the attackers. It was reported that the two attackers were arrested and sentenced to five days' detention.⁵³

Secondly, the same difficulty in determining the impairment of the dignity of the diplomatic mission also appears in the case of the dignity of the diplomatic agent. In the

⁵¹ Hereafter referred to as the IPP Convention.

⁵² 'Vehicle Carrying Japan's Ambassador to China Attacked in Beijing' (*The Diplomat*, 27 August 2012) <<http://thediplomat.com/2012/08/vehicle-carrying-japans-ambassador-to-china-attacked-in-beijing/>> accessed 27 June 2014.

⁵³ 'Two Held in China over Attack on Japanese Envoy's Car' (*BBC News*, 2 September 2012) <<http://www.bbc.co.uk/news/world-asia-china-19473048>> accessed 24 June 2014.

above case, the car of the Japanese ambassador was intercepted and the national flag of Japan was torn in front of the ambassador. Such actions are an obvious impairment to the dignity of the ambassador. However, it is well recognised that not all incidents involving the possible impairment of the dignity of the diplomatic agent are as easy to determine as the aforementioned incident, and so, each incident has to be reviewed individually. Here the famous early case of *Respublica v De Longchamps*⁵⁴ which involved the impairment of the dignity of a consul is worth mentioning. On 17 May 1784, De Longchamps 'was heard to exclaim in a loud and menacing tone', saying 'I will dishonour you!' to the French consul general Francis BarbéMarbois.⁵⁵ Two days later, on the 19 May 1784, Longchamps met the French consul in the street and 'struck the cane' of the consul. Here two controversies arise. First, whether the slight oral offence (that is, the specific sentence of 'I will dishonour you!') amounts to the impairment of the dignity of the consul? Second, whether the action of striking the cane of the consul amount to the impairment of the dignity of the consul? In the judgment of the case, Chief Justice M'Kean of the Court of Oyer and Terminer pointed out that:

As to the assault, this is, perhaps, one of that kind, in which the insult is more to be considered, than the actual damage; for, though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of Assault and Battery, and among gentlemen, too often induce duelling, and terminate in murder. As, therefore, anything attached to the person, partakes of its inviolability; De Longchamps' striking Monsieur Marbois' cane, is a sufficient justification of that gentleman's subsequent conduct.⁵⁶

It can be seen from the above comment that even slight oral offence and slight impolite action would be considered as the impairment of the dignity of the diplomatic agent

⁵⁴ See 1 US 111 (1784), (Justia.com) <<http://supreme.justia.com/cases/federal/us/1/111/case.html>> accessed 24 June 2014.

⁵⁵ Ibid.

⁵⁶ Ibid 114.

(though in this case the victim is a consul, not a diplomatic agent). Probably, the reason why the slight offence in the above case can be justly considered as attack on the dignity of the diplomatic agent can be best explained by the classic text of Vattel:

It is true that the sovereign should protect every man who happens to be in his States, whether citizen or alien, and keep him secure from all violence; but this care is due in a higher degree to a foreign minister. An act of violence towards an individual is an ordinary crime which a prince may pardon according to circumstances; but if it is committed against a public minister it becomes a crime of State and an offence against the Law of Nations...⁵⁷

Though the case of *Respublica v De Longchamps* can serve as an example of how to determine the impairment of the dignity of the diplomatic agent, it is worth emphasizing that the case happened in late eighteenth century, over two hundred years ago. At that time the law of international human rights had yet to develop. Even the right of expression was a newly developed concept. Thus, whether the judgment in that case can serve as a precedent for recent cases is questionable, especially in countries where constitutional right of expression are strongly protected.⁵⁸ It should be reiterated that the wording of ‘treat him with due respect and shall take all appropriate steps to prevent any attack on his dignity’ in Article 29 of the VCDR does not denote that the receiving State has to suppress the right of expression as a necessary measure to protect the dignity of the diplomatic agent. Therefore, it may be difficult to determine whether a spat involving a diplomatic agent with an ironic comic published in a newspaper insinuating about a diplomatic agent can really be deemed as ‘impairment to the dignity’ of the diplomatic agent and that the related author should be punished. Evidently, when the authorities of the receiving State face a complaint from a diplomatic agent, they have to make their own judgment carefully, otherwise they may either be accused of failing to

⁵⁷ ED Vattel, *The Law of Nations* (CG Fenwick tr, first published 1758, Oceana 1964) 371.

⁵⁸ It is worth mentioned that the case of happened before the birth of the US Constitution 1787 and the French Declaration of the Rights of Man and of the Citizen 1789.

carry out their duty under Article 22.2 of the VCDR by the sending State, or be accused of failing to respect the right of expression by their own citizens.

Last but not least, there is one final thorny issue which cannot be overlooked. All the above sections deal with the inviolability of the diplomatic agent. However, it should be noted that according to Articles 37.1 and 37.2 of the VCDR, the protection of the dignity of a diplomatic agent also applies to the family members of the diplomatic agent, as well as the administrative and technical staff of the mission and their family members as long as they are not nationals or permanent residents of the receiving State. In addition, according to Article 38 of the VCDR, a diplomatic agent who is a national of or permanent resident of the receiving State enjoys inviolability in respect of official acts performed in the exercise of his functions, which suggests that his dignity should be protected. With regard to the family members, the possible impairment of their dignity is even more difficult to determine as they rarely get involved in diplomatic functions. Moreover, they are more easily accessible by members of the general public. It is doubtful whether the authorities of the receiving State will be able to deal with all complaints from the diplomatic agents about the impairment of the dignity of the wife or children of that diplomatic agent. For instance, if a teacher scolds the son of an ambassador in the class in a primary school, should the teacher be investigated and prosecuted for the possible impairment of the dignity of the son of the ambassador? Or if the wife of an ambassador has a quarrel with another woman due to some personal affairs between the ambassador and that woman, should the authorities punish that woman for verbal abuse? In these situations it is well beyond the ‘appropriate steps’ requirement for the receiving State to take actions against the other parties. This might be even more problematic in relation to the protection of the dignity of the family members of the administrative and technical staff of the mission. All of these situations reflect the dilemma of the authorities of the receiving State, and obviously, it is not correct and appropriate to disregard the right of expression of the general public or a private individual so as to favour the dignity of the family members of the diplomatic personnel.

To sum up, the aforementioned three issues reflect the controversies arising from the protection of the dignity of the diplomatic agent and the respect of the right of expression, which gives rise to the dilemma faced by the authorities of the receiving State. Like the controversy and dilemma concerning the protection of the diplomatic mission, it is not easy to determine whether the protection of the diplomatic agent should always be prior to the respect of the right of expression. In the next chapter, several solutions which aim at settling the related issues will be proposed.

Chapter 7 Settling the Controversies and Dilemmas: Traditional and Alternative Solutions

The previous two chapters focused on the controversies arising from conflicts between the principle of the diplomatic inviolability and other norms of international law. The conflicts, as noted at the beginning of the thesis, reflect one remarkable theoretical issue in contemporary international law, that is, the fragmentation of international law.¹ Accordingly, the crux of the issue lies in how to find solutions that effectively mitigate the conflicts between diplomatic law and other norms of international law, and at the same time, not radically change the contemporary regime of diplomatic law or undermine the basis of public international law. Since the principle of diplomatic inviolability is closely associated with State practice, it is essential to examine solutions from the perspectives of both theory and practice of not only diplomatic law but also of public international law in general. Moreover, the feasibility of certain solutions must be considered.

This chapter has two sections. In the first section, various traditional solutions proposed by international law scholars will be examined. These solutions exemplify some of the most influential and representative solutions proposed by well-known international law scholars. In the second section, several alternative solutions which may be regarded as suggestions and recommendations to the authorities of the receiving State will also be proposed.

¹ See the Introduction section of the thesis.

7.1 Traditional Solutions to the Controversies

As was noted in previous chapters, the controversies arising from conflicts between the principle of diplomatic inviolability and other norms of international law are by no means a recent development in the evolution of the principle of the diplomatic inviolability. Some controversies, such as the application of the right of self-defence against the personal inviolability of the diplomatic agent, had been discussed in classic treatises of international law as early as the Classical Period of the seventeenth and eighteenth century.² It is of less doubt that, since the adoption and entry into force of the VCDR, international law scholars keep providing their considerations on contemporary issues such as the conflict between the inviolability of mission premises and the right to demonstrate — a ‘new’ issue which was not possibly analysed by scholars in the Classical Periods, as well as reviewing their predecessors’ insightful comments on the ‘classic’ issues such as the applicability of the right of self-defence in extreme situations. Meanwhile, State practice since the adoption and entry into force of the VCDR also reveals the consideration of State parties to the VCDR on both the classic and new issues. It is these very facts that form the traditional solutions discussed here in this section.

7.1.1 Traditional solutions proposed by scholars

Four traditional solutions are of particular importance and will be discussed in the following paragraphs.

a) The strict application of the principle of diplomatic inviolability

The very first solution to the controversies arising from the conflict between the principle of diplomatic inviolability and other norms of international law is actually a simple and straightforward one. It requires the strict application of the principle of

² See the discussion by Grotius, Wicquefort, Bynkershoek and Vattel on the applicability of the right of self-defence in Chapter 5, section 5.2.2 (b).

diplomatic inviolability by the authorities of the receiving State in all circumstances. This requires that Articles 22, 27 and 29 of the VCDR must be strictly construed and observed in all cases. Accordingly, such application means an absolute and unqualified inviolability. Tunkin, Hardy and Nahlik are three of many proponents of this solution. They all recalled the discussion over the absolute nature of the principle of diplomatic inviolability during the drafting process in the ILC and concluded that the strict application of the principle of diplomatic inviolability is the correct interpretation of relevant provisions in the VCDR. According to Tunkin:

International relations would be seriously impaired, it said, if the authorities of the country of residence were given the right to enter the premises of missions in exceptional cases, without the consent of the head of the mission.³

Similarly, with regard to the absolute inviolability of the diplomatic bag, Tunkin commented:

[I]f the country of residence were given the right to refuse passage to diplomatic mails on the suspicion that they contained objects barred from import and export, there was the possibility that this channel of communications would be closed altogether.⁴

Hardy also provides a very similar argument:

If a unilateral power of determination were given to the receiving State in one context, for example, with respect to the outbreak of fire, by parity of reasoning the power should extend, or might in practice be extended, to acts based on other paramount necessities, such as those of state security—and this no sending State wished to see. Thus, even if a mission fails to use its premises in accordance with legitimate purposes, its inviolability must still be respected by the receiving State.⁵

³ G Tunkin, 'Vienna Convention on Diplomatic Relations' (1961) 6 *International Affairs* 51, 54.

⁴ *Ibid.*

⁵ M Hardy, *Modern Diplomatic Law* (Manchester 1968) 44.

With regard to the personal inviolability of diplomatic agents, Hardy follows the same logic:

[I]f, for example, the diplomatic is endangering the immediate physical safety of members of the public...In extreme cases of this kind the receiving State may be expected to take steps necessary to prevent the diplomat from committing crimes or offences. Neither the International Law Commission nor the Vienna Conference wished, however, to introduce any express exceptions to the general principle of inviolability of members of mission staff from arrest or detention, thus following the same attitude as was adopted in the case of inviolability of premises and property.⁶

Nahlik also commented on the absolute inviolability of the mission premises stipulated in Article 22 of the VCDR by stating that:

The question was discussed and the opinion prevailed that providing for the possibility of a presumed consent, even in exceptional cases only, could be construed in a way encouraging the authorities of the receiving State to presume the occurrence of such an exceptional situation. Therefore, no such possibility was mentioned and the noun 'consent' is not accompanied by any adjective.⁷

The reason that these three scholars felt worried about any exception to the absolute inviolability is clear: the exception to the general rule of absolute inviolability would inevitably lead to the abuse of the unilateral power of determining 'extreme situations' by the authorities of the receiving State, and so, the security of the mission premises, and possibly the security of the confidential mission archives will be compromised. Even the personal freedom of diplomatic agents may be manipulated by the authorities of the receiving State. In fact, the infamous fire incident in which KGB agents posed as firefighters⁸ provides a vivid illustration of how vulnerable the mission archives will be

⁶ Ibid 51.

⁷ SE Nahlik, 'Development of Diplomatic Law: Selected Problems' (1990) 222 *Recueil Des Cours* 187, 275.

⁸ 'KGB Snoopers During Embassy Fire' (*Los Angeles Times*, 1 May 1991) <http://articles.latimes.com/1991-05-01/news/mn-1029_1_classified-operations> accessed 26 June 2014, also cited in Chapter 5, section 5.2.2 (a) (i).

if the authorities of the receiving State are entitled to enter the mission premises without the consent of the head of the mission, in the situation of a fire or similar scenarios. Moreover, if the authorities of the receiving State were given the unilateral power to determine an 'extreme' situation, they may be tempted themselves to set a fire around the mission premises and then enter the mission premises on their own initiative. Just as Sen commented on the discussion during the drafting discussion in the ILC:

Such a power in the hands of the receiving State may well lead to abuse as situations could be created as a pretext to enable the local officials to enter the premises, such as by throwing an incendiary bomb.⁹

Such serious consequence may not be imaginary, if the absolute inviolability of mission premises was defeated by certain exceptions. Based on the deduction above, similar conclusions can be formed with regard to the absolute inviolability of diplomatic agents and diplomatic property.

This traditional and straightforward solution obviously has its merit. Indeed, this solution is based on the authentic 'black-letter' interpretation of the original provisions providing for the principle of diplomatic inviolability in the VCDR. It also reflects the deep misgivings expressed by scholars and by commissioners and delegates during the drafting discussions in the ILC and the Vienna Conference.¹⁰ Thus, this solution represents the orthodox theory and practice of the principle of diplomatic inviolability that has generally been observed by States.

On the other hand, the major shortcoming of this solution is also conspicuous. The 'Achilles' heel' of this solution is that it fails to take into account the recent development of other branches of international law, especially international human rights law. As can be seen above, most proponents of this solution based their

⁹ B Sen, *A Diplomat's Handbook of International Law and Practice* (3rd edn, Martinus Nijhoff 1988) 113.

¹⁰ EL Kerley, 'Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities' (1962) 56 AJIL 88, 102-103, 116-118.

arguments on the discussion in the ILC and at the Vienna Conference, which took place well over fifty years ago. The proponents themselves are scholars of the 1960s when the Cold War was at its height. International relations during that time had mostly negative influence on diplomatic contact, and so, the absolute inviolability of mission premises, diplomatic agents and diplomatic property (especially the diplomatic bag) was justly regarded as the most essential way to protect the diplomatic activity of the sending State. However, with the progressive development of international human rights law as well as other branches of international law, absolute inviolability has been facing more and more challenges. As analysed in the previous two chapters, the necessity of protecting national security, public safety and human life and the development of international human rights law frequently requires the authorities of the receiving State to reconsider the ‘black and white’ stipulation of the principle of diplomatic inviolability in the VCDR. Finally, the jurisprudence of the ICJ—one source of the principle of diplomatic inviolability, expressly points out that the inviolability of diplomatic agents is by no means absolute if there is a necessity to forestall an ongoing crime.¹¹ To sum up, it can be argued that the traditional solution of sticking to the strict application of the principle of diplomatic inviolability has already faced the problem of how to follow up the recent development of international law.

b) Overriding the principle of diplomatic inviolability when there are ‘serious reasons’

The second traditional solution to the controversy is perhaps of equal importance to the first one, except for the very fact that this solution adopts the opposite method. While the first solution requires the strict application of the principle of diplomatic inviolability, the second solution calls for the flexible interpretation and application of Articles 22, 27 and 29 of the VCDR. In fact, the most radical proponents of this solution

¹¹ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 86.

argue that whenever there appears to be a necessity to protect other vital interests, or whenever there are ‘serious reasons’ to challenge the inviolability of diplomatic premises, diplomatic agents or diplomatic property, the inviolability should be overridden so as to protect other interests, including specifically the security of the State, public safety, or human life. Mann is one of the proponents of this solution. According to Mann:

[I]t is suggested that the inviolability of a mission’s premises is by no means absolute, but must give way if the mission has allowed such dangers to arise in its premises as to provoke the receiving State and take measures reasonably necessary to protect the security of the life and property of the inhabitants.¹²

Mann’s argument is supported by a group of other scholars who provide similar comments. Beaumont, for instance, thoroughly reviewed the argument presented during the discussion in the UK Foreign Affairs Committee following the notorious shooting of policewoman Fletcher in April 1984, concluded that the doctrine of self-defence ‘remains, in the proper context, a legitimate exception to the general principle of diplomatic inviolability.’¹³ By asserting the possibility of invoking the right of self-defence against the principle of diplomatic inviolability, Beaumont obviously supports what Mann had contended.

In addition to those who ardently advocate the natural priority of protecting national security, public safety and human life, there are some other scholars who adopt a similar but more moderate solution. Although these scholars admit the possibility and legitimacy of overriding the principle of diplomatic inviolability under extreme situations, they emphasize the need for caution if overriding the principle of diplomatic inviolability. They typically argue that such solution can only be used as a last result—

¹² FA Mann, “‘Inviolability’ and other Problems of the VCDR’ in FA Mann, *Further Studies in International Law* (OUP 1990) 336.

¹³ JS Beaumont, ‘Self-Defence as a Justification for Disregarding Diplomatic Immunity’ (1991) 29 *Canadian Yearbook of International Law* 393- 398.

truly this condition is what the right of self-defence under customary international law required. For instance, Denza holds the opinion that:

In the last resort, however, it cannot be excluded that entry without the consent of the sending State may be justified in international law by the need to protect human life.¹⁴

Sir Ivor Roberts in the latest edition of *Satow's Diplomatic Practice* provides a similar comment, though he refers to the situation of protecting national security instead of the protection of human life:

Entry in such circumstances of threat to national security can only be justified, if at all, as a measure of self-defence.¹⁵

Similar assertions are also presented by McClanahan¹⁶ and Wilson.¹⁷

The merit of this solution lies in that it provides enough flexibility for the receiving State to apply the principle of diplomatic inviolability, in response to various dilemmas faced by their authorities. By permitting its authorities to override the principle of diplomatic inviolability, the receiving State may effectively forestall subversive activities which will otherwise threaten its national security, or in other scenarios, stop an ongoing crime committed by a diplomatic agent, or save a victim who had been abducted and put in a crate labelled as a diplomatic bag as happened in the Dikko incident. By way of adopting this solution, vital interests (the national security of receiving State, public safety and human life) can be effectively protected.

However, the shortcomings of this solution are also obvious. First of all, there is a practical difficulty. To what extent can the authorities of the receiving State determine a

¹⁴ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (3rd edn, OUP 2008) 150.

¹⁵ I Roberts (ed), *Satow's Diplomatic Practice* (6th edn, OUP 2009), para 8.11.

¹⁶ GV McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (Hurst 1989) 183-184.

¹⁷ CE Wilson, *Diplomatic Privileges and Immunities* (The University of Arizona Press 1967) 63.

so-called ‘extreme situation’ or prove that there exist ‘serious reasons’ to override diplomatic inviolability? Especially with regard to the inviolability of diplomatic bags, it is extremely difficult for authorities to prove ‘serious reasons’ to challenge the content of the diplomatic bag, without adopting some method that itself amounts to a virtual breach of inviolability.¹⁸ Even the use of sniffer dogs may be considered as an insult to the dignity of the sending State. Furthermore, for scholars who propose the adoption of this solution only as a last result to protect national security or human life, there is the added difficulty of how to define the concept of ‘last result’? In fact, in many situations, there may have other feasible methods to bring certain threats to an end. Contacting the head of the mission, or even the Ministry of Foreign Affairs of the sending State, is always better than directly overriding the inviolability of diplomatic premises, diplomatic agents and diplomatic bags.

Secondly, there is also a theoretical difficulty. As the judgement of the ICJ in the *Tehran Hostages Case* points out:

The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter such abuse.¹⁹

This assertion suggests that generally the principle of diplomatic inviolability shall not be overridden by rules outside the regime of diplomatic law. Moreover, with regard to

¹⁸ A Zeidman, ‘Abuse of the Diplomatic Bag: A Proposed Solution’ (1989) 11 Cardozo Law Review 427, 437-438. Zeidman argues that ‘[a]ny “bag” containing such contraband [eg, murder weapons, drugs, and kidnapped people] should not be considered a diplomatic bag and thus not afforded any customs privilege’. The issue is, how can the authorities prove the abuse of the diplomatic bag without adopting methods that reveals the content of the diplomatic bag? Regrettably, Zeidman provides no answer to this question.

¹⁹ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 86.

the development of international human rights law, the ILC's Conclusion of the Work of the Study Group on the Fragmentation of International Law suggests that:

In case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. Instead, States bound by the treaty obligations should try to implement them as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization.²⁰

Furthermore, as was noted in Chapter 5, apparently the theoretical method of determining the hierarchy of norms in international law cannot provide a satisfactory answer to the conflict.²¹ Contrary to the assertion of some scholars, even the protection of human life is not generally recognised as a rule of *jus cogens* or one of the peremptory norms of international law.²² Therefore, on what theoretical grounds can scholars who support the solution of overriding diplomatic inviolability to protect other interests validate their assertions? Even considering the existence of customary international law norm of protecting these interests, it is not particularly convincing to argue that the protection of specific human rights, for instance, the right of demonstrate, shall be a priority over the dignity of the diplomatic agent. It is absolutely true that certain interests are protected both under treaty law and customary international law.²³ However, it is also true that the principle of diplomatic inviolability is also well established both in treaty law and customary international law, and undoubtedly, the inviolability of diplomatic agents has a much longer history than any human rights norms.²⁴

²⁰ 'Conclusion of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law', Conclusion (26), in A Pronto and M Wood (eds), *The International Law Commission 1999-2009* (OUP 2010) vol IV, 621.

²¹ See Chapter 5, section 5.3.2. See also Asher DB, 'Human Rights Meet Diplomatic Immunities: Problems and Possible Solutions' [2000] Harvard Law School Academic Year 2000-2001 Paper No.2, 20-23.

²² See the discussion in Chapter 5, section 5.3.3.

²³ For instance, the right to demonstrate and the right to expression. See the discussion in Chapter 6.

²⁴ See Chapter 2.

Therefore, the assertion provided by those scholars that argue that the principle of diplomatic inviolability should be overridden by the necessity to protect national security, public safety, human life and other human rights norms is far from perfectly settling the controversy.

c) Amending the VCDR or drafting a new multilateral convention

In addition to the above two major solutions which reflect the different interpretation of the original provisions in the VCDR, there are two other solutions which call for change in the current legal regime of the principle of diplomatic inviolability. One solution requires the necessary amendment to the absolute inviolability stipulated in the VCDR. The major argument is that by amending the original provisions in the VCDR to bring them in line with the similar provisions in the VCCR, most of the controversy will be solved. As noted in Chapter 5, the VCCR stipulates that the consent from the head of the mission can be ‘assumed in case of fire or other disaster requiring prompt protective action’.²⁵ It is also worth noting that the personal inviolability of consular officers is not absolute. According to Article 41.1 of the VCCR:

Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

Moreover, the consular bag is also subjected to the ‘challenge and return’ option which is evidently accepted in customary international law.²⁶ All of these provisions in the VCCR provide an attractive and seemingly effective solution to the conflicts between the application of the principle of diplomatic inviolability and other norms and vital interests. However, such a solution itself faces both theoretical and practical difficulties. Theoretically, the distinction between diplomatic inviolability and consular inviolability should not be blurred, especially with regard to the distinction between the diplomatic

²⁵ Article 31.2 of the VCCR, cited in the discussion in Chapter 5, section 5.2.2 (a) (i).

²⁶ Article 35.3 of the VCCR, cited in the discussion in Chapter 5, section 5.2.2 (c).

premises and consular premises. One authority of consular law incisively points out three reasons that distinguish the absolute inviolability of diplomatic premises and the conditional inviolability of consular premises:

First, embassies, though no longer regarded as ‘extraterritorial’ in the sense of being territory of the sending State, symbolise its sovereignty, which would be denigrated by entry without permission. Second, embassies typically house more politically sensitive documents, thus requiring greater safeguards against intrusion. Third, embassies are typically housed in detached buildings, so that a fire hazard is contained, whereas consulates are often located in parts of downtown office buildings.²⁷

Evidently, such distinction also exists with regard to the inviolability of diplomatic agents and diplomatic bags, due to the very different nature of diplomatic agents and diplomatic bags.

Practically, amending the original provisions in the VCDR to reflect the similar provision in the VCCR is by no means an easy task. In the first place, the VCDR does not include provisions on how to amend it. Thus, according to the general rule of multilateral treaty amendment, the possible amendment of the VCDR may require all the 190 State parties to agree on the amendment, or at least require a vote of two-thirds of the State parties to adopt the amendment.²⁸ Whatever the procedure is adopted, it is obvious that ‘the mechanism for securing amendment is cumbersome and uncertain, and the prospects for securing agreement to amendment are poor’, as commented in the UK

²⁷ LT Lee and J Quigley, *Consular Law and Practice* (3rd edn, OUP 2008) 359.

²⁸ Article 40.2 of the Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331, adopted 23 May 1969, entered into force 27 January 1980). Though the rules of this Convention generally do not apply to treaties entered into force before it, it can be said that the rules for amendment reflect customary international law and therefore can be applied in a retrospective manner to the VCDR. See also Zeidman (n 18) 438-439.

Foreign Affairs Committee's Report on the Abuse of Diplomatic Immunities and Privileges.²⁹

There is another solution that requires change of the current legal regime of the principle of diplomatic inviolability, though it does not call for amendment of the VCDR. Instead, it requires the draft of a brand new multilateral convention on relevant topics. Based on the principle of '*lex specialis derogat generali*' and '*lex posterior derogat priori*', were this new convention to enter into force, its rules would supersede the old rules in the VCDR, and therefore, solve the controversial issues. However, the very fact that the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Courier 1989 failed to become a multilateral convention vividly illustrate how much divergence among States on various issues regarding the inviolability of diplomatic bags, not to mention the other divergence on the inviolability of diplomatic premises and diplomatic agents. Overall, it can be concluded that both the proposed solution of amending the VCDR and the draft of a brand new convention are not feasible.

7.1.2 Reflections on the traditional solutions

The above four traditional solutions to the controversy arising from the conflicts between the principle of diplomatic inviolability and other norms of international law are not perfect. In fact, none of the four solutions is able to perfectly tackle the dilemma faced by the authorities of the receiving State. The first solution obviously reflects a much conventional application of the principle of diplomatic inviolability. Admittedly, the strict application of the principle of diplomatic inviolability is indeed consist with the intention of the drafters of the VCDR. However, it should be admitted that the drafters of the Convention in the 1960s were not able to envisage the negative

²⁹ UK House of Commons Foreign Affairs Committee, 'The Abuse of Diplomatic Immunities and Privileges' (1984/85 HC 127), para 54. See also 'Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to "The Abuse of Diplomatic Immunities and Privileges"' (1985 Cmnd 9497), para 11.

consequence of abuse of the diplomatic inviolability. Neither could they predict the rapid development of international human rights law and the jurisprudence of the ICJ. Although this solution is probably still the default choice adopted by most receiving States when they faced the dilemma whether the principle of diplomatic inviolability or other norms and interests shall prevail, its applicability has been challenged frequently. To ignore the protection of other vital interests, especially the necessity to protect human life in emergency, will receive more criticism than the observing diplomatic law will be praised.

The second solution, though it provides an attractive solution to the controversy, cannot be free from both theoretical and practical difficulties. Theoretically this solution fails to address the issue of balancing and harmonizing different norms in international law. As has been noted, the Conclusion of the Work of the Study Group on the Fragmentation of International Law calls for the observation of different treaty norms, and the State should endeavour to harmonize them. This solution actually advocates the opposite method and may inevitably intensify the conflict between diplomatic law and other norms. Practically, the authorities of the receiving State face the difficulty of determining what constitutes 'serious reasons' and 'extreme situations'. Without the determination of these two terms, it would be untenable for them to challenge the principle of diplomatic inviolability. The paradox is that in certain situations, they are unable to identify an abuse of inviolability without themselves effectively breaching the relevant inviolability, particularly in the case of the inviolability of the diplomatic bag.

The third and fourth solutions, though avoiding the theoretical controversy unsolved by the former two solutions, are unfeasible. The fact is that most State parties to the VCDR are reluctant to make any radical change to the contemporary regime of diplomatic law, reflecting their misgivings to concede the principle of diplomatic inviolability to other norms of international law. After all, the change from absolute inviolability to conditional inviolability will ultimately affect the inviolability of their missions, diplomatic agents and diplomatic bags. To conclude, it can be asserted that the

aforementioned four traditional solutions fail to settle the controversy perfectly. Therefore, some alternative solutions need to be considered.

7.2 Alternative Solutions to the Controversies

As was noted above, one of the major shortcomings of the traditional solutions is that in theory, neither diplomatic law nor international human rights law can secure a higher position in the hierarchy of norms in international law. This applies equally to the protection of human life and State security or other similar norms. The traditional solutions proposed by international law scholars cannot overcome the difficulties of determining which norm shall prevail over other norms. Scholarly debates on whether the protection of State security or human life shall override the principle of diplomatic inviolability inevitably end in deadlock. Neither diplomatic law scholars nor human rights law scholars can persuade the other side to admit the superior position of their law. Even though it can be envisaged that in the near future, the traditional solutions may still dominate the mainstream discussion on the controversy arising from the conflicts between the principle of diplomatic inviolability and other norms of international law, some alternative solutions are worth noting. After all, issues of diplomatic inviolability are not purely academic concerns. They are of great importance to the diplomatic relations of States and the conduct of international affairs. Therefore, the identification of feasible solutions is critical. In general, the four alternative solutions to be discussed in the following sections avoid the traditional approach of determining which norms shall prevail or whether the principle of diplomatic inviolability stipulated in the VCDR should be changed or superseded. Instead, these solutions propose practical recommendations to the receiving State and may help the authorities to tackle the dilemma with which they are faced in certain scenarios.

7.2.1 Alternative solutions to the controversies

a) Permitting the breach of inviolability without alternating the existing law: the ‘hard case’ solution

The first alternative solution is proposed in more general terms by one reputable scholar of international law and now judge of the ICJ. In his article ‘NATO, the UN and the Use of Force: Legal Aspects’, Simma points out that:

[T]here are ‘hard cases’ involving terrible dilemmas in which imperative political and moral considerations leave no choice but to act outside the law. The more isolated these instances remain, the less is their potential to erode the rules of international law. The possible boomerang effect of such breaches can never be excluded, but the danger can be reduced by spelling out the factors that make an ad hoc decision distinctive and minimize its precedential significance.³⁰

Based on Simma’s opinion, it can be argued that the dilemmas faced by the authorities of the receiving State may bring out ‘hard cases’ in which there seems no choice but to breach the international obligation. Some notorious incidents as mentioned in previous chapters can be regarded as ‘hard cases’. For instance, if the crate carrying Dikko was indeed correctly labelled as a diplomatic bag and it had the official seal on it, the UK official at the airport faced a ‘terrible dilemma’ of whether they should open the crate regardless of the actual breach of the inviolability of the diplomatic bag. According to Simma, the answer would be clear: undoubtedly, in this scenario, the diplomatic bag can be opened, for there were ‘imperative moral considerations’ and ‘no choice’ were left, apart from breaching the inviolability of the diplomatic bag. Moreover, Simma would emphasize that such a breach of the inviolability of the diplomatic bag does not mean the inviolability under Article 27.3 became conditional. He would argue that the breach of the inviolability of the diplomatic bag in the Dikko incident merely reflects how the authorities of the receiving State should act in such a ‘hard case’, and that breach of the obligation of the principle of diplomatic inviolability should not give rise to any precedent that negates absolute inviolability when there is a necessity to protect human life. Similarly, if in the Fletcher incident the Libyan embassy had become a fortress with individuals shooting continuously at the street, as Sir Francis Vallet

³⁰ B Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1, 22.

imagined, the UK police could enter the mission premises and do what was necessary to stop the shooting. Again, according to Simma's theory, such an obvious breach of the inviolability of mission premises would not be treated as a precedent to the unqualified inviolability of mission premises under Article 22.1 of the VCDR.

Simma's 'hard case' solution definitely has its merit. Indeed, it provides a real practical solution for the authorities of the receiving State when they face the dilemma of determining whether they can ever override the principle of diplomatic inviolability in certain cases. Even though they will still be challenged by the sending State for their breach of the inviolability, their act can be at least justified if they can prove that they had no choice but to override the inviolability in certain situations.³¹ The essential point is that the 'hard case' solution will not change the principle of diplomatic inviolability, nor will it ever intend actually to exempt the authorities of the receiving State from their international obligations under the VCDR. The essence of this solution lies in the fact that the authorities of the receiving State are entitled to breach diplomatic law occasionally if circumstances so required. The breach of diplomatic law in these circumstances reflects a temporary necessity, an expedient, so as to save human life or protect public safety, State security and essential human rights. Thus, the legal framework of the VCDR is retained and no amendment is needed, and there is no further necessity to draft a brand new multilateral convention. Because this is only an expedient, no serious academic debate is necessary. No arguments that 'diplomatic inviolability should prevail over human rights' nor that 'the protection of human life should override diplomatic inviolability' would be worth arguing before adopting the decision whether or not diplomatic inviolability should be overridden in situations when 'imperative political and moral considerations' so required.

³¹ Though, as Simma contended, '[A]ny attempt at legal justification will ultimately remain unsatisfactory'. See *ibid* 14.

The key shortcoming of this solution is also obvious. As the term ‘hard case’ suggests, it reflects a relatively rare case, and so this solution should not be used frequently. Perhaps it coincides with what Denza suggests, as ‘the last resort’.³² Thus, the application of this solution is limited to extreme, rare situations where no other feasible choices are available, and the situation must be extremely urgent, as can be seen in the Dikko incident (had the crate be a diplomatic bag) or the Fletcher incident (had the shooting continued and more people were dead or wounded). Such a limit means that the ‘hard case’ solution cannot be applied in less urgent situations. For instance, if the authorities of the receiving State suspect that a diplomatic bag contains items that might threaten the national security of the receiving State, they can demand the bag to be returned, but not to open the bag. Likewise, when a fire breaks out in the embassy premises, the firefighters of the receiving State should not enter the premises using their own initiative without first obtaining consent from the head of the mission, for they have other choices available such as to keep waiting until the head of mission felt that they really needed the firefighters’ aid. In short, as long as there are other available choices, this solution cannot be used. Another conspicuous shortcoming of this ‘hard case’ solution is actually envisaged by its very proposer, Simma. He admits that ‘the boomerang effect of such breaches can never be excluded’, which suggests that there is potential danger that even sporadic use of the ‘hard case’ solution may lead to further erosion of the existing legal framework. It is just like opening the Pandora’s Box: even if the receiving State does not intend to change the contemporary regime of the principle of diplomatic inviolability under the VCDR, nor does it pursue the exemption from its international obligations under the VCDR, potentially the resulting breaches of the principle of diplomatic inviolability may be regarded as precedents by other receiving States. And so, it may be inevitably that other receiving States follow the same solution and gradually the regime of the principle of diplomatic inviolability will be undermined.

³² Denza (n 14) 150.

This may be very relevant if these States believe that the contemporary regime needs to be changed (*opinio juris*). As a result, it may ultimately lead to the formation of new customary international law governing the principle of diplomatic inviolability. Such a result may be too radical to be true. However, the potential danger should not be overlooked by diplomatic law scholars.

b) Adopting administrative measures: improving coordination and cooperation

Various administrative measures can also be adopted by the receiving State to tackle dilemmas. To be specific, if the receiving State can build up effective communication channels between its local authorities and the diplomatic mission of the sending State as well as the Ministry of Foreign Affairs (MFA) of the sending State, some practical difficulties may be solved. It is admitted that normally, foreign diplomatic mission will contact the MFA for important issues. However, it is also true that usually, contacts between embassies and the MFA of the receiving State are less efficient if some extraordinary situation happens. If there happens to be an earthquake or other natural disasters, the head of mission may not be able to contact the MFA of the receiving State if the ambassador himself is seriously wounded. In such scenarios the local authorities may be in confusion and face the dilemma of whether they should come to the rescue immediately, without obtaining the consent from the head of the mission. If there is an effective communication channel between them and the MFA of the sending State, such difficulties can be greatly reduced, and the dilemma arising from the conflict of the inviolability of mission premises and the necessity to protect human life may be solved. In such cases when the protection of human life is a great priority, it is better for them to obtain consent from the MFA of the sending State, and this is definitely more efficient than waiting for the MFA of the receiving State to contact the MFA of the sending State. In the situation where there is a planned demonstration outside the foreign embassy, if the local authorities can notify the foreign diplomatic mission in advance, they can help the diplomatic mission assess the possible danger and therefore, decide whether the embassy need extra protection by the local police. If such coordination and cooperation

are made in time, the dilemma arising from the conflict between the inviolability of mission premises and the respect of the right to demonstrate may not arise.

This proposed solution requires much better coordination and cooperation between the local authorities (police, firefighters, etc) and foreign diplomatic mission. This can be achieved by setting up a direct hotline between the police bureau, the fire department and the foreign diplomatic mission, as well as the MFA of the sending State. As has been noted above, direct communication between the local authorities and the foreign diplomatic mission and the MFA of the sending State is evidently more effective than communication between the MFA of the receiving State and the foreign diplomatic mission, or between the MFA of the receiving State and the MFA of the sending State. As a result, the improvement of direct communication can greatly solve the dilemma faced by the authorities of the receiving State in certain scenarios.

In addition to improvement in coordination and cooperation between the local authorities and the foreign diplomatic mission and the MFA of the sending State, the coordination and cooperation between the local authorities and the MFA of the receiving State also needs also to be improved. This is especially significant to help solving the dilemma arising from the conflict between the inviolability of mission premises and respect of the right to demonstrate. As suggested in the First Report from the UK Foreign Affairs Committee, the liaison between local police and the Foreign and Commonwealth Office should be improved so that enough consultation will be received in time by the local police, so as to determine the nature of a planned demonstration.³³ Obviously, international lawyers in the MFA are far more familiar with diplomatic law than local police officers. And so, their advice may provide useful guidance for the local police to solve dilemma arising from the conflict between the inviolability of mission premises and the respect of the right to demonstrate.

³³ See UK House of Commons Foreign Affairs Committee, 'The Abuse of Diplomatic Immunities and Privileges' (1984/85 HC 127), para 125-126.

c) Making specific legislation

With regard to the dilemma arising from conflict between the inviolability of mission premises and the right to demonstrate, there is another effective solution: making specific legislation to regulate demonstrations outside foreign diplomatic missions. As was noted in Chapter 6, the US government has its Statute of the District of Columbia to regulate the specific situation of demonstrations outside foreign diplomatic missions.³⁴ In Japan, the government has its Law on the Maintenance of Peace and Order of Surrounding Areas of the National Congress and Foreign Embassies 1988, in which Articles 5.1, 6 and 7 not only provide the regulation of the use of microphone speakers outside foreign embassy premises but also stipulates the relevant enforcement and punishment procedure if a violation of such regulation occurs.³⁵ Specific legislation on demonstrations outside foreign diplomatic missions is much more effective in tackling dilemmas faced by the authorities of the receiving State than is legislation on demonstrations in general. Indeed, in the First Report from the UK Foreign Affairs Committee, Draper criticised the fact that neither the UK Metropolitan Police Act 1839 nor the Public Order Act 1934 are effective to tackle with demonstrations outside foreign diplomatic missions.³⁶ The Finnish Act on Public Meetings 1907, as noted in Chapter 6, also fails to address various practical difficulties.

Compared with the legislation on demonstrations in general, the specific legislation on demonstrations outside foreign diplomatic missions has several advantages. First and foremost, such specific legislation can provide more practical regulations on the limits of a planned demonstration. For instance, it can expressly stipulate what a demonstrator

³⁴ See Chapter 6, section 6.1.3.

³⁵ Japanese Research Institute of International Cases (ed), *Diplomatic and Consular Relations* (Keio University Press 1996) 72-73. Original text is in Japanese.

³⁶ 'The Abuse of Diplomatic Immunities and Privileges' (n 33) para 46.

can do and what he cannot do. This will probably reduce the potential threat of a demonstration to the mission premises. As the aforementioned Japanese legislation illustrates, the prohibition on using microphone speakers in the area surrounding a foreign embassy³⁷ may greatly reduce the possibility of the intentional playing of loud noise by demonstrators, and accordingly, will reduce the possibility of raising the dilemma faced by the authorities of the receiving State. Similarly, the legislation can set a minimum safety distance between the mission premises and the demonstrators. Secondly, such specific legislation can also provide local authorities with practical guidance on how to control an ongoing demonstration. In essence, it will turn the rather subjective discretion into much more objective determination, to help the local police officers determine in which case they can take actions against the demonstrators, without violating their right to demonstrate. Thirdly, such legislation will also provide the legal basis for the determination of whether a demonstration meets its legal limits, since the right to demonstrate is only protected if it is in conformity with the stated law and regulations. In a word, enacting specific legislation on demonstrations outside foreign diplomatic missions can greatly facilitate the authorities of the receiving State in tackling the dilemmas arising from the conflict between the inviolability of mission premises and the respect of the right to demonstrate. Though this solution only applies to one specific dilemma, it is obviously a good alternative solution than those traditional solutions discussed in the former sections.

d) Educating the general public about diplomatic law

Last, but not least, it is worth proposing that educating the general public about diplomatic law may help in solving the dilemma faced by the authorities of the receiving State in several scenarios. Diplomatic law itself is not among everyman's knowledge and the general public usually has prejudice toward diplomatic

³⁷ See Article 5.1 of the Law on the Maintenance of Peace and Order of Surrounding Areas of the National Congress and Foreign Embassies 1988.

inviolability.³⁸ The prejudice may well lead to demonstration targeted at the foreign diplomatic missions, as well as encouraging attacks against the dignity of foreign diplomatic agents. The interception of the car of the Japanese ambassador in Beijing in August 2012 is a vivid example of such an incident.³⁹ If the government of the receiving State can effectively educate its citizens about the core rules of the principle of diplomatic inviolability, such as not to attack diplomatic agents, similar incidents may be avoided. Accordingly, the authorities of the receiving State may face fewer dilemmas.

7.2.2 Reflections on the alternative solutions

The four alternative solutions discussed above can be distinguished from the traditional solutions in several aspects. First of all, these solutions avoid the traditional theoretical debates on whether the principle of diplomatic inviolability should be treated as absolute, and whether other norms of international law, especially the protection of human life and other essential human rights, should prevail over diplomatic inviolability in certain scenarios. Secondly, these solutions provide the authorities of the receiving State with practical guidance to settle the controversy, and effectively tackle with the dilemma to some extent. Thirdly, these solutions avoid impractical change of the current regime of diplomatic law under the VCDR, thus keeping the regime of diplomatic law relatively immune from the fragmentation of international law. They enhance the regime of diplomatic law as a self-contained regime. By focusing on administrative measures rather than pure theoretical debates, these solutions indeed provide more helpful guidance for the authorities of the receiving State to tackle with the dilemmas they may confront.

³⁸ GV McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (Hurst & Company 1989) 1. See also G Kaufman, 'Is Diplomatic Immunity Necessary?' in C Ashman and P Trescott, *Outrage: An Investigation into the Abuse of Diplomatic Immunity* (WH Allen 1986) 1-4.

³⁹ See the incident cited in Chapter 6, section 6.2.2.

Admittedly, it must be emphasized that these alternative solutions still have their limits. The above analysis reveals that some solutions can only be adopted with regard to specific scenarios, and not universally applied to all other dilemmas. These solutions are not the panacea to the controversy arising from the conflicts between the principle of diplomatic inviolability and other norms of international law. They cannot solve all the dilemmas faced by the authorities of the receiving State. That being said, these alternative solutions still provide their distinctive value for the authorities of the receiving State. As has been analysed above, by adopting these solutions, the authorities of the receiving State will be able to tackle the dilemmas they face more smoothly and more effectively and probably overcome the dilemmas. It is this merit that makes these solutions a valuable alternative to the traditional solutions to the controversies and dilemmas.

Conclusions

The previous seven chapters deliver a comprehensive examination of the principle of diplomatic inviolability. In this final part of the thesis, a general summary of the thesis will be provided, which will be followed by an assessment of the future of the principle of diplomatic inviolability.

General summary of the thesis

Based on the analysis in these chapters, the following major points can be summarised:

First, based on the examination of the historical evolution of the principle of diplomatic inviolability, it can be revealed that the old principle has successfully adapted itself to the vicissitude of diplomatic methods, diplomatic law and in particular, international law. The historical evolution vividly illustrates how the rudimentary customary rules of the principle of diplomatic inviolability of ancient times progressively evolved into a complicated system of treaty rules, now embracing not only one of the oldest rules of international law—the personal inviolability of diplomats, but also the inviolability of diplomatic premises and diplomatic property in which the hot-debated inviolability of the diplomatic bag is of particular importance. This evolution process reveals a significant fact that the principle of diplomatic inviolability has distinct relevance to the development of international law. It is due to this very fact that the significant development of the principle of diplomatic inviolability achieved in the Classical Period of the seventeenth and eighteenth centuries. It is also due to this fact that the recent remarkable development of international law brings new challenges to the old principle of diplomatic inviolability. Evidently, the emergence and development of new trends and phenomena in international law, such as international human rights law; the ever-growing emphasis on the protection of national security and human life; the debate over the applicability of the right of self-defence; and the suggested fragmentation of

international law, all affect the continued application and significance of the principle of diplomatic inviolability. Indeed, the controversies revealed in Chapters 5 and 6 illustrates the remarkable impact of other norms of international law have had on the established rules of the principle of diplomatic inviolability.

Secondly, based on the examination of the core rules of the principle of diplomatic inviolability in the VCDR, it can be concluded that the contemporary regime of the principle of diplomatic inviolability under the VCDR successfully crystallises all the essential rules of the principle of diplomatic inviolability. In the first place, both of the two distinct aspects of the concept of diplomatic inviolability—the immunity from any interference and enforcement from the authorities of the receiving State and the positive protection by the receiving State, can be found expressly elaborated in various provisions in the VCDR, especially in Article 22 (the inviolability of mission premises) and Article 29 (the personal inviolability of diplomatic agents). Secondly, the modern theoretical basis of the principle of diplomatic inviolability is expressly mentioned in the preamble to the VCDR, which serves as a guideline principle to the application and interpretation of various provisions of the principle of diplomatic inviolability. There is no doubt that the theory of ‘extraterritoriality’ has been discarded, and the theory of ‘functional necessity’ becomes the essential theoretical basis, which is supplemented by the theory of ‘representative character’. Thirdly, compared with former attempts at codification of diplomatic privileges and immunities by various institutions and private individuals in which the principle of diplomatic inviolability was only summarily mentioned,¹ the VCDR provides a more comprehensive codification of all essential aspects of this cornerstone principle of international law. Indeed, the VCDR constitutes the first time in the thousand years’ evolution of the principle of diplomatic inviolability that all essential aspects of the principle—not only the oldest rule of personal

¹ See Chapter 2, section 2.2.4. The only documents which did provide a systematic codification of the rules of principle of diplomatic inviolability is the Harvard Draft. Nevertheless, important aspects such as the inviolability of diplomatic bags and the inviolability of diplomatic couriers were not mentioned.

inviolability of diplomatic agents, and the most important rule of the inviolability of diplomatic premises, but also miscellaneous rules such as the inviolability of diplomatic archives, diplomatic correspondence, diplomatic couriers and bags, and the inviolability of minor mission staff and family members – have been systematically stipulated. It can therefore be asserted that the VCDR contains the quintessence of the contemporary regime of the principle of diplomatic inviolability.

Thirdly, based on the examination of the controversy over the principle of diplomatic inviolability in various scenarios, it can be emphasized that the principle of diplomatic inviolability — undoubtedly one of the oldest established principles of international law, being stipulated in one of the most acclaimed and widely ratified multilateral convention in contemporary international law — is nevertheless not free from controversies. As was discussed in Chapter 4, failure to observe the principle of diplomatic inviolability without a valid excuse constitutes a breach of the international obligation of the receiving State under the VCDR, which will ultimately give rise to State responsibility. On the other hand, ignoring the protection of other vital interests may bring about other issues, such as the potential threat to the national security of the receiving State, the threat to public safety and human life as well as to the potential breach of international obligations under international human rights treaties and domestic law. As was analysed in Chapters 5 and 6, the controversies arising from the conflicts between the principle of diplomatic inviolability as expressly elaborated in provisions such as Articles 22, 27 and 29 of the VCDR and other norms of international law such as the protection of national security, the protection of public safety and human life and respect for the right to demonstrate and freedom of expression as embodied in various international conventions as well as customary international law, reveal the extraordinary theoretical and practical difficulties in the actual State practice of the principle. These difficulties are represented by the dilemmas faced by the authorities of the receiving State in certain scenarios, from the necessity to forestall an imminent threat to the national security of the receiving State to the necessity to save human life from abusive shooting from a window inside mission premises; from the urgent rescue of wounded diplomatic personnel to granting permission for an organised

demonstration outside a foreign embassy. As was discussed in Chapters 5 and 6, these scenarios are not based on textbook style of pure academic discussions of this old principle of international law, but are truly relevant to real incidents that have occurred and continuing to occur almost every year if not every month or every day in international affairs.² These controversies represent great challenges to the principle of diplomatic inviolability. Even though some of the controversies can be traced back to the classical period, they have become extraordinarily conspicuous in contemporary State practice. As a result, these controversies give rise to dilemmas in which the authorities of the receiving State have to determine whether they should override the principle of diplomatic inviolability so as to protect other vital interests derived from norms of international law.

Fourthly, based on the examination of the proposed solutions to these dilemmas, it can be admitted that there is no single straightforward solution to settle all the controversies and dilemmas arising from the conflicts between the principle of diplomatic inviolability and other norms of international law. Scholars of past generations have dedicated some of their work to finding out various solutions to settle the controversy and dilemma. Four traditional solutions have been proposed, namely the strict application of the principle of diplomatic inviolability, overriding the principle of diplomatic inviolability in certain situations, amending the contemporary regime of the principle of diplomatic inviolability under the VCDR and the drafting of a brand new multilateral convention on the principle of diplomatic inviolability. All have their merits and shortcomings. Unfortunately, these traditional solutions are by no means perfect, and they either lack practicability or flexibility, and most of them fail to solve theoretical issues arising from the controversy. On the other hand, there are four

² For instance, a recent incident in March 2014 in which three Rwanda diplomats were expelled by the South African government for their involvement in an attack on a Rwandan general. See 'South Africa, Rwanda Expel Diplomats over Attack on Dissident Rwandan General' (*Reuters*, 7 March 2014) <<http://www.reuters.com/article/2014/03/07/us-safrica-rwanda-idUSBREA2613L20140307>>accessed 27 June 2014.

alternative solutions which try to avoid the theoretical debates. These alternative solutions, namely the ‘hard case’ solution—permitting the breach of inviolability without changing the existing law, adopting administrative measures, making specific legislation and educating the general public, provide some practical ways to settle the controversies and dilemmas. However, some of these alternative solutions can only be adopted in response to specific situations and cannot be universally applied to all other dilemmas. These alternative solutions are, accordingly not the panacea to the controversy arising from the conflicts between the principle of diplomatic inviolability and other norms of international law.

The future of the principle of diplomatic inviolability

The above four general conclusions may well give rise to a fundamental question concerning the future of the principle of diplomatic inviolability. Given that the old principle of diplomatic inviolability is now facing new challenges and it seems that no satisfactory solution is available to perfectly settle the controversy, is it possible for the principle of diplomatic inviolability to survive the impact from the controversy and continue to serve as one of the cornerstone principles of international law? The answer is undoubtedly a ‘Yes’.

First and foremost, recent incidents of attack on diplomatic premises and diplomatic agents³ prove that in contemporary international affairs, the principle of diplomatic inviolability is still indispensable. Without the continuing emphasis on the protection of diplomatic premises, diplomatic agents and diplomatic property, it can be foreseen that the conduct of international diplomacy will be at stake. After all, it is the principle of diplomatic inviolability that essentially provides diplomats with safety, security and immunity from unnecessary harassment from the authorities of the receiving State. The reality that the principle of diplomatic inviolability served as a safeguard of diplomatic

³ See various incidents happened in 2012 and 2013, cited in Chapters 5 and 6.

functions will not be radically changed, hence the continuing relevance of the principle of diplomatic inviolability to daily diplomatic activities.

Secondly, compared with the numerous publications of academic treatises on diplomatic law up until the 1980s, in more recent decades there has been a relatively small number of academic treatises published on the theme of diplomatic law. The only notable monograph specifically dealing with the principle of diplomatic inviolability is Barker's *The Protection of Diplomatic Personnel*.⁴ In addition, there are the new edition of Denza's authoritative *Diplomatic Law*⁵ and a newly updated *Satow's Diplomatic Practice*⁶ edited by Sir Ivor Roberts that discussed the principle of diplomatic inviolability. This fact does not mean that the principle of diplomatic inviolability has lost scholars' attention and favour. In fact, it suggests that the time-tested principle of diplomatic inviolability has been generally observed by State parties to the VCDR. With the gradual theoretical progress and increase in the cooperation between States, it is of less doubt that the current trend in the State practice will continue.

Thirdly, the old principle has proved itself capable of adapting to the changing theory and practice of diplomatic method, diplomatic law and international law. Surely it will be able to stand the impact from the new challenges it faces and overcome both theoretical and practical difficulties of its application, perhaps through the efforts from legal authorities of diplomatic law. Indeed, during the classical period of seventeenth and eighteenth century it was scholars such as Grotius, Bynkershoek, Wicquefort and Vattel that greatly boosted the theoretical breakthrough in the evolution of the principle of diplomatic inviolability. Nowadays, diplomatic law authorities like Denza and Barker

⁴ JC Barker, *The Protection of Diplomatic Personnel* (Ashgate 2006).

⁵ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (3rd edn, OUP 2008).

⁶ I Roberts (ed), *Satow's Diplomatic Practice* (6th edn, OUP 2009).

endeavour to provide their insightful thoughts on the theme of diplomatic inviolability. With the efforts and dedication of generations of diplomatic law scholars, it is not unrealistic to predict that in the future, the controversies discussed in previous chapters can finally be settled, and the dilemma faced by the authorities of the receiving State will also be solved.

Therefore, it can optimistically be predicted that, despite the controversy and unsatisfactory solutions to the controversy, the principle of diplomatic inviolability will continue to play an essential role in the progressive development of diplomatic law. It will be, as it has always been, one of the cornerstone principles of international law, and will continue to be observed by all States intending to develop friendly relations with one another, ‘irrespective of their differing constitutional and social systems’.⁷

⁷ Preamble to the VCDR.

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